CHILD PORNOGRAPHY

HEARING

BEFORE THE

SUBCOMMITTEE ON JUVENILE JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 2856

A BILL TO AMEND THE SEXUAL EXPLOITATION OF CHILDREN ACT OF 1977

DECEMBER 10, 1982

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CHILD PORNOGRAPHY

FRIDAY, DECEMBER 10, 1982

U.S. SENATE,
SUBCOMMITTEE ON JUVENILE JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:50 a.m., in room 2228, Dirksen Senate Office Building, Hon. Arlen Specter (chairman of the subcommittee) presiding.

Present: Senator Grassley.

Staff present: Mary Louise Westmoreland, counsel; Ellen Greenberg, professional staff member; and Suzanne Spiegel, staff assistant.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA, CHAIRMAN, SUBCOMMITTEE ON JUVENILE JUSTICE

Senator SPECTER. The hearing will come to order of the Juvenile Justice Subcommittee. I regret we are somewhat late this morning, ladies and gentlemen. We have been working on a couple of other subcommittee matters including the Justice Assistance Act and the career criminal bill. Some of the unanimous-consent arrangements that we are trying to circulate on the floor have necessitated our being somewhat tardy and I am sorry for that.

Today we are conducting the third in a series of hearings by the Senate Juvenile Justice Subcommittee on the sexual exploitation of children. The first hearing on November 5, 1981, explored the nature and scope of child exploitation while the second hearing focused on the Federal law enforcement response to this problem. We will now examine the Federal child pornography laws to determine how we can best protect the interests of our children without unduly restricting our first amendment guarantees of freedom of speech and expression.

Over the last 20 years, child pornography has become a multimillion-dollar industry, victimizing thousands of children. Yet, it was not until 1977 that Congress passed the Protection of Children Against Sexual Exploitation Act. This Federal law prohibits the production and commercial distribution of materials depicting children under age 16 engaged in sexually explicit conduct if the materials are to be mailed or otherwise transported in interstate commerce. The act also prohibits the transportation of minors across State lines for prostitution or any other form of prohibited sexual conduct for the purpose of commercial exploitation.

The delicate balance between protecting children from sexual abuse and guarding first amendment rights was shifted by the Supreme Court's recent decision in *New York* v. *Ferber*. For the first time, the Court ruled that the compelling State interest in safeguarding the physical and psychological well-being of children constitutionally justified the prohibition of nonobscene sexually explicit photographs.

The Court also declined to invalidate the New York law on the grounds that it overbroadly prohibited such legitimate works as National Geographic photographs or illustrations in a medical text.

Shortly after the *Ferber* decision, I introduced S. 2856 to address this problem. This bill expands the Sexual Exploitation of Children Act to eliminate the requirement that materials depicting sexually explicit conduct involving children under 16 meet the obscenity standard to fall under the act's prohibition. To avoid the potential overbreadth problem acknowledged by the Supreme Court, S. 2856 would require that materials which depict nude children not engaging in sexually explicit conduct must continue to meet the constitutionally mandated obscenity standards.

[Text of S. 2856 follows:]

II

97TH CONGRESS
2D SESSION

S. 2856

To amend the Sexual Exploitation of Children Act of 1977.

IN THE SENATE OF THE UNITED STATES

AUGUST 19 (legislative day, AUGUST 17), 1982

Mr. SPECTER introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the Sexual Exploitation of Children Act of 1977.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2251 of title 18, United States Code, is amended in subsection (c)—

(1) by striking out "$10,000" and inserting in lieu thereof "$75,000"; and (2) by striking out "$15,000" and inserting in lieu thereof "$150,000".

SEC. 2. Section 2252 of title 18, United States Code is amended—

(1) in subsection (a)(1) by striking out "for the" through "obscene" and inserting in lieu thereof "any";

(2) in subsection (a)(2) by striking out "for the" through "obscene" and inserting in lieu thereof "any"; and

(3) in subsection (b)—

(A) by striking out "$10,000" and inserting in lieu thereof "$75,000"; and

(B) by striking out "$15,000" and inserting in lieu thereof "$150,000".

SEC. 3. Section 2253 of title 18, United States Code is amended—

(1) in clause (2)(E) by striking out "lewd exhibition" and inserting in lieu thereof "exhibition without literary, artistic, scientific or educational value"; and

(2) in clause (3) by striking out ", for pecuniary profit".

Senator SPECTER. Today we are going to have a series of witnesses headed by St. Martin's Press in New York City. We are going to have Mr. Robert Pitler, chief of the Appeals Bureau of the Manhattan district attorney's office; Detective Joseph Haggerty, of the morals division of the D.C. Metropolitan Police Department; and Dr. John Dillingham, codirector, special projects of the Washington School of Psychiatry.

I am pleased to have with me on the panel this morning the distinguished Senator from Iowa, Senator Grassley, who has taken the lead on legislative initiative in the field of child pornography. We have worked together on the Judiciary Committee now for 2 years, and it is a pleasure to have him with me on this panel. And I now turn the podium to you, Senator Grassley, for any opening comments that you may wish to make.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. It will be my pleasure to work another 2 years or longer with you on this committee when we start the new Congress.

First of all, I want to commend you for your unfaltering diligence in seeing that this and other problems relating to the victimization of our youth are aired so that we might begin the next process, a difficult process, of rehabilitation.

I am aware that the subcommittee that you chair has conducted hearings on the problem of runaway and homeless youth. Child pornography might be labeled a "fallout" from the runaway problem in that homeless youth, alone and without resources, often emotionally disturbed, risk being victimized by exploiters. They may become involved in prostitution and in forms of delinquency which involve major costs to the youths themselves and ultimately to society at large.

I am happy to say that an amendment that I offered to the Violent Crime and Drug Enforcement Act of 1982, which I might add, Mr. Chairman, you cosponsored, was adopted in the criminal package and passed on October 1, 1982. In general terms, this amendment differs from S. 2856 in that it more closely follows the Supreme Court's opinion in *New York* v. *Ferber,* which was decided in July of this year. Specifically, this amendment eliminates the requirements of legal obscenity from Federal child pornography statutes. It also removes the commercial limitation provision of 18 U.S.C. 2252 in recognition that many of the individuals who distribute materials covered by the statute do so by trade or exchange without any commercial purpose.

S. 2856 contains a provision that would not restrain the distribution of materials involving minors if the materials contain "literary, artistic, scientific, or educational value." The bill is perhaps attempting to exempt from prosecution materials such as National Geographic issues or perhaps the "Show Me" volume that will be referred to at today's hearing.

Nevertheless, the Supreme Court did address and assess this definition and concluded that it would not properly control the type of

depictions that we are trying for all practical purposes to extinguish. The Court stated, and I quote:

> A work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography.

The Court then went on to quote from the memorandum of Assemblyman Lasher in support of the disputed New York regulation and noted:

> It is irrelevant to the child (who has been abused) whether or not the material * * * has a literary, artistic, political, or social value * * *

The Court therefore concluded that the *Miller* standard is an implausible solution to the child pornography problem.

Mr. Chairman, I am aware of how anxious you are to create a record here today so I am not going to take any more time, but let me conclude by noting that Congress designated 1981 as the "Year of the Child." It is my hope that 1983 will become known in Congress as the year we made good on that promise, both in fact and in form.

Senator SPECTER. Thank you very much, Senator Grassley.

[The prepared statement of Senator Mathias follows:]

STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.
BEFORE THE SENATE JUDICIARY SUBCOMMITTEE ON JUVENILE JUSTICE
DECEMBER 10, 1982

As a member of the Subcommittee on Juvenile Justice, I would like to commend Senator Specter for convening these hearings on proposed amendments to the Protection of Children Against Sexual Exploitation Act of 1977. Although other engagements prevent me from attending the hearing, I remain intensely interested in the subject matter of these proposals, and I plan to review the proceedings today with great care.

The immediate impetus for the legislative proposals which will be considered today is the decision of the United States Supreme Court in the case of New York v. Ferber. In that decision, handed down last July 2, the Court ruled that the states could constitutionally ban the distribution of sexually explicit material depicting minors, even if the material was not legally obscene, as the Supreme Court has defined that term. The 1977 statute against child pornography reaches only material that is legally obscene. Unquestionably, the Ferber decision gives Congress the power to extend the statute to cover other, non-obscene sexually explicit depictions of children.

Often our legislative decisions in the area of pornography turn on whether or not the Congress may, in conformity with the First Amendment, enact a given regulation. Today, we need not concentrate exclusively on that question. Instead, we must turn to the sometimes knottier query of whether we should take a step which we believe the Constitution will permit.

Two considerations ought to inform our deliberations on that question. The first is a purely practical concern. Is the incremental volume of non-obscene child pornography

significant enough to justify the commitment of enforcement resources to that area? Or should enforcement activities be concentrated in the field of the most hard-core child pornography, which meets the test for legal obscenity?

The Judiciary Committee addressed this question when it first reported the 1977 child pornography bill. The Committee's report had this to say about non-obscene pornography:

> It was the opinion of the experts who testified before the Committee that virtually all of the materials that are normally considered child pornography are obscene under the current standards .... In comparison with this blatant pornography, non-obscene materials that depict children are very few and very inconsequential. Thus it would be extremely unwise to jeopardize the effectiveness of any federal effort to combat hard-core child pornography by also attempting to prohibit the sale and distribution of...non-obscene... materials.

Now, after five years' experience with the child pornography statute, we should review this conclusion about non-obscene materials, and reexamine the assumptions underlying the Congress' decision not to criminalize distribution of such materials.

The second consideration is a more subtle one. While Ferber authorizes us to take another step in the prohibition of sexually explicit material involving minors, it does not tell us precisely how long that stride should be. Legitimate concerns have been raised about whether a prohibition on all such material, regardless of the context of the presentation or the scope of distribution, might sweep too broadly. Nothing in the Ferber decision detracts from the principle that prohibitions on expression and publication must be precisely drawn. We are here to protect children against the horrors of sexual exploitation; we are not here to suppress or inhibit the expression of controversial ideas on sexuality or on any other subject.

The list of witnesses at this hearing suggests that we will today make a good beginning in compiling the data which we need to make a wise and well-informed decision. We all share an interest in effective enforcement of the child pornography laws. We all share a fundamental commitment to protect the nation's children. Senator Specter has launched a timely effort to improve the effectiveness of enforcement, and to deepen that fundamental commitment. I am proud to join him in that effort.

Senator SPECTER. At this time I would like to call on Mr. McCormack and Mr. Rich to step forward.

Mr. MCCORMACK. Senator, may I have counsel to St. Martin's Press sit with me, Mr. Roy Gainsburg of Szold & Brandwen, in New York City?

Senator SPECTER. Well, I do not know that you need counsel for these purposes since this is not custodial interrogation, but you certainly are free to have counsel. We welcome him.

Gentlemen, we very much appreciate your joining us for this hearing today. And let us start with you, Mr. McCormack.

STATEMENTS OF THOMAS J. McCORMACK, PRESIDENT, ST. MARY'S PRESS, NEW YORK CITY, ACCOMPANIED BY ROY GAINSBURG, ESQ., SZOLD & BRANDWEN, P.C., NEW YORK CITY; AND R. BRUCE RICH, WEIL, GOTSHAL & MANGES, COUNSEL, FREEDOM TO READ COMMITTEE, THE ASSOCIATION OF AMERICAN PUBLISHERS, NEW YORK CITY

Mr. MCCORMACK. I understand that all of you on the committee have had an opportunity to read the statements that each of us has prepared, and I have been asked this morning if we can, in a sense, hurry to the essence of what we have to say.

Senator SPECTER. Yes; our practice is, Mr. McCormack, that your statements will appear in full in the record and we would ask that you summarize the highlights, leaving the maximum time available for questions and answers.

Mr. MCCORMACK. All right. The first four or five pages of my statement simply tell who I am and what the company is in an attempt to persuade you that the credentials of St. Martin's Press are such as to suggest that pornography, and obscenity, and harmful books are not our standard fare.

I then go on in those pages to describe the origin of the book "Show Me," which Dr. Fleischhauer-Hardt is the author of, and who the photographer is. I describe the circumstance of the creation of the book and the impulses behind the creation of the book, the premise that ran through Dr. Fleischhauer-Hardt's mind. All of that is in the prepared statement that you have before you.

It is only late in the statement that I finally say how I shall try to be specific about sections 2252 and 2253. I do not quarrel with

the increase in penalty and there certainly is such a thing in this world as child abuse, and I also agree that it can take the form of sexual exploitation that this law is addressing. The law aims to curtail this exploitation by banning its sometime product. I think I understand most of the thinking behind the laws up to now.

When the Supreme Court upheld the New York statute, it did express qualms about the potential overbroad application of the law and it foresaw the possibility that the statute would be used to ban works that the original legislators had not intended to ban. I know they did name explicitly National Geographic. We had reason to believe they had other works in mind.

It is my layman's impression that the Supreme Court does not write laws; it weighs them; you, the Members of the Senate, do write laws and you can improve the phrasing of current laws which I realize is exactly why all of us are here today. But if the Federal statute is modified in the way I see it proposed, it will still be overbroad, it will still ban "Show Me" and it will ban many of the works now emerging from the new clinical and personal insights into human sexuality.

Accepting that the Ferber films did exploit children and that they should be justly outlawed, I submit that it is possible to phrase the law in such a way that the Ferber films and those like them can be banned while "Show Me" and books like it can be spared. Webster tells us that to exploit is to make use of meanly or unjustly for one's own advantage or profit. While I can agree that films like Ferber's do exactly that, I can tell you that "Show Me" did not.

There are in fact children under 16 in "Show Me" depicted in conduct, whether it be actual or simulated, stipulated as sexually explicit by section 2253. The depictions are not confined to the exhibition of the genitals or the pubic area. This conduct was indeed prescribed by Dr. Fleischhauer-Hardt and performed so that Will McBride could photograph it. But I maintain that neither those events nor the book that proceeded from it was exploitative of the children.

I have read Fleischhauer-Hardt's book a number of times, and I do not agree with all of it. But I have not one iota of doubt about her sincerity. She is intelligent, and she is experienced with children, and with sex education, and I have met the woman. She is a strict Freudian psychologist and what she conveys personally is, I confess, no very great humor, but also no meanness or unjustness whatsoever. She absolutely believes, and so do many others, that hiding the facts of sex from children is deeply harmful. She believes that her book could not have done its job if children were not photographed in it. In her view, it is madness to try to pretend that children younger than 16 do not engage in sexual activity, either alone or with others. Taxed with the question of why, among the photographs of erections in the book, one of them must be that of a boy so young that he has no pubic hair, her emphatic answer is because 12-year-old boys do have erections and it should be conveyed to them that other 12-year olds do, too. That it is normal. Besides, she will ask, why do you want to hide the fact that boys have erections?

Again, and always the point is not that we need agree with Dr. Fleischhauer-Hardt, but she has a right to her views and she is sincere in it, and that many nonwicked people feel she is right, including the people in Germany who participated in the creation of her book. The children and their parents knew explicitly that they were being asked to pose for a book expressing Dr. Fleischhauer-Hardt's thesis and that it was aimed at prompting a totally open and honest colloquy between parents and children about sex. They knew it was not for 42d Street films or for an under-the-counter magazine that intentionally panders to the prurient. They knew this, and I think it is a fair guess to say that they would not deem the authors mean, unjust, or exploiters in any degree.

If all of this is right, then I maintain it is incumbent upon you to devise language for sections 2251 through 2253 that would not put Fleischhauer in jail for 10 years. There is, ladies and gentlemen, something wrong with any law that would do that.

I think the remedy may lie in the phrase "without literary, artistic, scientific, or educational value." But not placed where S. 2856 now has it because, as I have tried to make clear, there are depicted in this book activities other than mere exhibition of genitals. Instead, I would use the phrase in such a way as to exempt any work, regardless of the sexually explicit conduct involved, that, taken as a whole, has serious literary, artistic, scientific, or educational value. Thus, while this revision would still achieve the intent of the law, the term "educational" would exempt "Show Me" and books like it from unjust suppression.

I can assure you that there are books like it. Just 3 weeks ago in New York, I rejected a book that was submitted to me by a London book house and I told them it would run afoul of American child pornography statutes. It is like "Show Me," a book perhaps more of sexual orientation than instruction. It is photographic and there were children in it. When I told the book agent why I thought it could not be published over here, he said: "You cannot be serious. This was not made for 42d Street." But neither is "Show Me."

Senators, I suspect that there are no perfect laws. All we can hope to do is make good ones and then, from time to time, amend them to something still better, all the while pressing on toward perfection and knowing we will never get there. It is a noble pursuit, made heroic to the extent that you will not relent in that pressing on. I urge you not to relent here.

I guarantee that there will be those who will oppose you, and those who will be happy to see "Show Me" suppressed, not because they honestly believe that a half dozen children were meanly and unjustly abused and damaged in Germany 10 years ago, but because they hate the book and what Fleischhauer-Hardt stands for. "I would not have that book for my children," they are saying, and that is acceptable. "Therefore, you shall not have it for yours." And that, it seems to me, is not acceptable at all.

Thank you very much.

[The prepared statement of Mr. McCormack follows:]

PREPARED STATEMENT OF THOMAS J. MCCORMACK

My name is Thomas McCormack. I am president of St. Martin's Press, a book publisher based in New York. St. Martin's has a College Textbook division, a Reference and Scholarly Division, and a General Books Division. The company does approximately 600 books a year. We have been the publisher of the Who's Who, the Grove's Dictionary of Music and Musicians, the Complete Works of John Maynard Keynes, and the complete works of the man who is possibly the most widely-read living author in the English language -- the Yorkshire veterinarian James Herriot. We are a subsidiary of the 150-year old London publishing firm, Macmillan Limited.

We have over the years published many books concerning children -- titles such as Baby Learning Through Baby Play, Baby Sense, Your Child's First Five Years, works on autism, works on dyslexia.

In 1975 we published a book called SHOW ME! A Picture Book of Sex for Children and Parents. It has sold close to 200,000 copies in North America. It is the fate of SHOW ME!, and books like it, that has prompted me to come before you today.

SHOW ME! is a volume of 176 pages, 34 of which are text explaining how to use the book and the rationale behind it. The text was written by Dr. Helga Fleischhauer-Hardt, a Swiss child-psychologist and sex educator. The bulk of the book is comprised of photographs by the award-winning American photographer Will McBride, who is based in Germany. The book begins with pictures of two children of about eight who express wonder and bafflement about sex. The succeeding pictures show the developing sexuality of older children, through to adulthood and, finally, parenthood. The pictures are thoughtful, affectionate and totally explicit. The authors devised the book as a tool for parents to use in discussing sex with

children. They chose photography as a medium because, in their words, "We are of the opinion that only an explicit and realistic presentation of sex can spare children fear and guilt feelings related to sexuality."

The premise behind their effort was a firm conviction that a completely open, relaxed and non-restrictive orientation to sex is the best way to bring children to adulthood with a healthy, happy sexuality. Children are not born with shame, guilt, fear, and anxiety about sex, says Dr. Fleischhauer-Hardt, they are taught them. Generally, it is not by outright condemnation of sex that these feelings are engendered. It is reasonable to believe that few children today are told in so many words that sex is a base and wicked thing. Instead, the taboo is usually conveyed by a constant shying away from sexual matters, an air of embarrassment or scandal when they do come up, and by a complete suppression of specific facts about sex. Prior to SHOW ME!, the leading sex orientation book for children was a cartoon book that talked liberally about seeds and eggs, but the only illustration of the activity of sex, of what happens between human beings, was a drawing of Mommy and Daddy in bed with the blankets drawn up to their chins. Children are much smarter than they're given credit for at picking up implicit messages. Something literally unspeakable is going on. It is never, never shown. It must be awful.

So Dr. Fleischhauer-Hardt conceived her book and wrote it, and McBride took the pictures in Germany ten years ago. The book was first published by Jugenddienst-Verlag, a publisher of children's books sponsored by the Lutheran Church.

St. Martin's translated the book and published it -- and was promptly brought to court in three states and Canada. The charge was obscenity, and in all four cases the book was exonerated. Each of the judges based his decision on a perception that, while some condemned the book, others, in

sizable numbers and with respectable credentials and clear sincerity, thought it very valuable. That was enough under the First Amendment, and under the Miller opinion, to acquit the book.

I realize that obscenity is not necessarily an issue here today, and I also realize that the freedom of speech protected by the First Amendment is not without limits. I have not come here to argue that anything and everything should be allowed to be published. But I do think that SHOW ME! -- and other books that are of equal honesty of intent and that any court of law would judge do indeed have serious educational value -- should not be suppressed.

And, ladies and gentlemen, SHOW ME! has been suppressed. Twenty states in the Union have child-abuse laws phrased in a way that prohibits the selling of SHOW ME!. One of those states is New York, where St. Martin's Press has its offices. In the wake of the Ferber decision, which upheld the constitutionality of these statutes, we have been forced to withdraw the book from publication, although we are still actively considering selling the book in the thirty remaining states, if we are legally able to do so. If Sections 2252 and 2253 of the Protection of Children Against Sexual Exploitation Act of 1977 are rephrased as proposed in Senate Bills S.2856 or S.2788, they will effectively ban the book in these remaining states, and SHOW ME! or any book like SHOW ME! will very likely never again be published in America.

SHOW ME! was the forerunner in a new age of sexual education and orientation in America and throughout the world. A generation ago there were not, as there are now, clinics whose therapeutic aims are to teach healthy sexual attitudes and practices by getting clients to examine, manipulate and thus understand their own bodies. And there are books being created that explain -- and depict -- the methods of these

clinics. More and more reasonable people now believe that suppressing the facts of sex, depriving young people of an understanding of what their body is and will be, creates much more harm than it ever prevented. The point is not that we should all agree with these advocates, but that we should respect -- and, indeed, defend -- their right to discuss and pursue their views.

Now I should try to be specific about Sections 2252 and 2253. I don't quarrel with the increase in penalty. There certainly is such a thing in this world as child abuse, and I also agree it can take the form of sexual exploitation that this law is addressing. The law aims to curtail this exploitation by banning its sometime product -- that is, visual or print material that depicts certain stipulated conduct which the law in effect defines as exploitative.

When the Supreme Court upheld the New York statute, it did express qualms about the potential overbroad application of the law. It foresaw the possibility that the statute would be used to ban works that the original legislators had not intended to ban.

It is my layman's impression that the Supreme Court does not write laws, it weighs them. You, the members of the Senate do write laws, and you <u>can</u> improve the phrasing of current laws. Which, I realize, is exactly what you are trying to do now.

But if the federal statute is modified in the way I see proposed, it will still be overbroad, it will ban SHOW ME!, and it will ban many of the works now emerging from the new clinical and personal insights into human sexuality.

Accepting that the Ferber films did exploit children and that they should justly be outlawed, I submit that it is still possible to phrase the law in such a way that the Ferber films and those like them can be banned, while SHOW ME! and books like it can be spared.

Webster tells us that "to exploit" is "to make use of meanly or unjustly for one's own advantage or profit." I can agree that films like Ferber's did exactly this; I tell you SHOW ME! did not.

There are in fact children under sixteen in SHOW ME! depicted in conduct -- whether it be actual or simulated -- stipulated as "sexually explicit" by Section 2253. The depictions are not confined to the exhibition of the genitals or pubic area. This conduct was indeed prescribed by Dr. Fleischhauer-Hardt, and performed so that Will McBride could photograph it. But I maintain that neither those events nor the book that proceeded from them was exploitative of the children.

I have read Fleischhauer-Hardt's book a number of times; I don't agree with all of it, but I have not one iota of doubt about her sincerity. She is intelligent, and she is experienced with children and with sex education. And I have met the woman. She is a strict Freudian psychologist and what she conveys personally is, I will confess, no very great humor but also no meanness or unjustness whatsoever. She absolutely believes -- and so do many others -- that hiding the facts of sex from children is deeply harmful. She believes that her book could not have done its job if children were not photographed in it. In her view, it is madness to try to pretend that children younger than sixteen don't engage in sexual activity either alone or with others. Taxed with the question of why, among the photographs of erections in the book, one of them must be that of a boy so young he has no pubic hair yet, her emphatic answer is "because twelve-year-old boys do have erections. It should be conveyed to them that other twelve-year-olds do too, that it is normal." Besides, she will ask, "Why do you want to hide the fact that boys have erections?"

Again and always the point is not that we need agree with Dr. Fleischhauer-Hardt, but that she has a right to her

view, that she is sincere in it, and that many non-wicked people feel she is right -- including the people in Germany who participated in the creation of her book. The children and their parents knew explicitly that they were being asked to pose for a book expressing Dr. Fleischhauer-Hardt's thesis, and that it was aimed at prompting a totally open and honest colloquy between parents and children about sex. They knew it was not for a 42nd street film or for an under-the-counter magazine that intentially panders to the prurient. They knew this, and I think it is a fair guess to say they would not deem the authors mean, unjust or exploitative in any degree.

If all of this is right, then I maintain it is incumbent on you to devise language for Sections 2251 through 2253 that would not put Fleischhauer-Hardt in jail for ten years. There is, ladies and gentlemen, something wrong with any law that would do that.

I think the remedy may lie in the phrase "without literary, artistic, scientific or educational value." But not placed where S.2856 now has it, because, as I have tried to make clear, there are depicted in this book activities other than mere exhibition of genitals. Instead, I would use the phrase in such a way as to exempt any work -- regardless of the sexually explicit conduct involved -- that, taken as a whole, has serious literary, artistic, scientific or educational value. Thus, while this revision would still achieve the intent of the law, the term "educational" would exempt SHOW ME! and books like it from unjust suppression.

And I can assure you there are, or would be, books like it: just three weeks ago in New York I rejected a book proposal from a British book house that may very well run afoul of U.S. child pornography statutes. It is, like SHOW ME!, a book perhaps more of sexual orientation than instruction; it is photographic, and there are children in it. When I told the

book agent why I thought it couldn't be published over here he said, "You can't be serious! This wasn't made for 42nd Street." But neither is SHOW ME!.

Senators, I suspect there are no perfect laws. All we can hope to do is make good ones, and then from time to time amend them into something still better, all the while pressing on toward perfection and knowing we'll never get there. It is a noble pursuit, made heroic to the extent that you will not relent in that pressing on. I urge you not to relent here. I guarantee there will be those who will oppose you, those who will be happy to see SHOW ME! suppressed not because they honestly believe that a half dozen children were meanly and unjustly abused and damaged in Germany ten years ago, but because they hate the book and what Fleischhauer-Hardt stands for. "I would not have that book for my children," they are saying -- and that is acceptable. "Therefore you shall not have if for yours," -- and that, it seems to me, is not acceptable at all.

Thank you.

Senator SPECTER. Thank you very much, Mr. McCormack.

We will hear now from Mr. Rich before proceeding to questions from the panel.

Mr. Rich, we welcome you here. Your full statement will be made a part of the record, and if you would summarize it, we would appreciate it.

STATEMENT OF R. BRUCE RICH

Mr. RICH. Thank you, Senator. It is a pleasure to be here on behalf of the Association of American Publishers.

The Association is the major book publishing association in the United States and I think it states the obvious to indicate that AAP's members are not pornographers nor do they profit from the business of child pornography. And it is also a fact that they, along with I think every other concerned citizen, deplore the types of child pornography which the Congress is here focusing upon and the child abuse attendant thereto, and applaud the legislative effort.

Why are we here, then? We have a deep and abiding countervailing concern and that is that the Congress not sweep so broadly in

its legislative initiatives as to deprive the American public of important, responsible, nonpornographic works which are not the stuff about which we believe your legislation is directed.

We took some great measure of comfort in the present Federal statute, which provided, as you well know, for the requirement that prior to banning dissemination of materials, those materials had to be determined to be legally obscene. We felt such limitations appropriate and we wrote briefs saying so in the *Ferber* case. We understand that the Supreme Court has now ruled and, as Senator Grassley indicated, has articulated a new definition of the coverage of the first amendment insofar as depictions of child pornography are concerned. But I think you would also agree with me that the Supreme Court decision is not a paradigm in clarity in all respects in terms of the nagging doubt that I think each of the Justices nonetheless had in writing their respective opinions concerning those perhaps few in numbers, but that is arguable, works which truly fall outside of the range of that which we are really talking about here—the business of child pornography, the clandestine, secret business of child pornography. The Court chose to talk about the National Geographic. Mr. McCormack is here to talk about an illustrious example of a clearly nonpornographic work that ought to fall outside of the legislative scheme—"Show Me." There are others. Putnam is about to publish a book in the near future, I am informed, which is not unlike "Show Me" in content and in purpose and effect, which is a frank, explicit sex education tool to be used by parents and children.

Our concern, therefore, Senators, is that the Congress give very careful consideration in drafting any new standard and, specifically, in removing the existing obscenity standard, if that is what you are going to in fact consider doing, so as to protect the right of legitimate works to exist and to be disseminated even if those works tend to be controversial in nature.

We have made, Senators, some rather specific proposals in our prepared statement, and let me simply summarize those very briefly.

We say, first, that it is not enough merely to tag on the literary, et cetera, exception to exhibitions of nudity, as Senator Specter's, own proposal would suggest. We think that this is difficult line drawing, to be sure, but that there are other categories of potentially defensible conduct, and "Show Me" again is an example of a book that embodies other forms of conduct, perhaps its exploration of one's genitals by an adolescent, by a young child, that technically might fall into the realm of masturbation. We have difficulty in drawing the line and saying that that particular portrayal ought to subject St. Martin's Press to an enormous criminal penalty while merely an exhibition short of that perhaps might not. We have difficulty with that line drawing and our legislative suggestion, therefore, is that the Congress broaden any literary, artistic, etc., exemption to cover the range of sexual conduct. And there I would concede to you the burden would be rather difficult on someone to show that a depiction of bestiality might have serious literary value. But I think it is terribly difficult for the Congress to anticipate precisely which form of work should be permitted to show which type of sexual depiction and drawing the line accordingly.

We would suggest having the literary, artistic, etc., exemption modify the entire range of conduct which would be otherwise prohibited.

Second, we find difficulty in attempting to apply such an exemption as pertaining to the depiction itself, which is how we construe Senator Specter's language. How do you determine in fact that a particular depiction, out of any contextual reference, does or does not have serious literary, educational, or scientific value? We find that test hard to work with. We find it inherently vague and we therefore suggest that you need a broader contextual reference within which to distinguish between a picture appearing, on the one hand, in a "Show Me," versus, on the other hand, in a piece of hard core pornography, or in a medical textbook. In the one event we may all concede it has a valid social purpose; on the other hand, we may say it has none. It seems to me that without that contextual reference, that you have got great difficulty. You have the enormous chilling effect, moreover, when you do not have that kind of clarification of not providing adequate guidance to legitimate publishers and those who legitimately distribute their works.

The suggestion therefore is to embody "taken as a whole" or some similar contextual reference point so that you can meaningfully determine whether what it is you are looking at—that depiction—has value or does not.

The final point we make in our statement is that, as drafted, the proposed revision to section 2252 creates, to our mind, an inadequate scienter standard because, as we would read the statute as modified, it would require solely that a person know that he is distributing the defined term "visual or print medium." That is really a meaningless scientific standard. There is no knowledge of doing anything criminal. As we read *Smith* v. *California* and the like, it seems to us there has to be some element of mental knowledge of culpability that the depictions themselves are or may be illegal. We have therefore in our statement, I think, proposed a modest change in where one places the knowing language to try to cure that problem.

Let me stop there and I will be happy to answer any questions.

[The prepared statement of Mr. Rich follows:]

Prepared Statement of R. Bruce Rich

The Association of American Publishers, Inc. ("AAP"), the major trade association of book publishers in the United States, submits this statement for inclusion in the record of this Subcommittee's hearings on proposals to amend the Protection of Children Against Sexual Exploitation Act of 1977 ("Act"). The impact of those proposals -- S.2856 and S.2788 -- upon book publishers is specifically addressed in the comments below.

AAP's more than 300 members represent a substantial segment of the book publishing community and are responsible for the publication of numerous prominent works concerning health, sexuality, psychology, child rearing and human development. It is AAP's belief that the book publishing industry must -- and does -- play a vital role in the production, dissemination and preservation of ideas and knowledge. AAP and its members are committed to the belief that the free exchange of ideas through publishing is the greatest service the publishing industry can render society, and further that the public's access to such ideas in book form should not be restricted.

Towards these goals, AAP and its members have diligently followed legal developments regarding publishing generally and judicial and legislative events which may implicate First Amendment rights in particular. The efforts of Congress and state legislatures to protect children from sexual abuse by outlawing child pornography have been viewed by AAP with both interest and concern. AAP's members of course deplore the exploitation of children to support a "kiddie porn" industry and fully support legislative efforts to curb such abuses. At the same time, they are deeply troubled by statutory provisions which, in an effort to con-

trol child pornography, threaten to sweep within their grasp a variety of serious works deserving of wide availability and unrestricted dissemination.

This concern over the potential overbreadth of child pornography statutes led AAP to closely monitor the enactment of, and the subsequent litigation concerning, New York's child pornography statute. As this Subcommittee is aware, it was a prosecution under one section of that statute that was reviewed by the Supreme Court in New York v. Ferber.

AAP participated as an amicus curiae in the Ferber litigation, urging both the Supreme Court and the New York Court of Appeals constitutionally to limit the legislative arsenal against child pornography to the prosecution of (1) persons who employ minors in the creation of kiddie porn, and (2) persons who publish or otherwise disseminate depictions of sexually explicit conduct by minors, provided the works containing such depictions are shown to be legally obscene. It was, and remains, the book publishing community's concern that more wide-ranging efforts to control child pornography -- through penalties upon the dissemination of non-obscene works containing portrayals of adolescent sexual behavior -- would eviscerate the significant societal benefits to be derived from the availability of a variety of materials concerning human sexuality and adolescent sexual development without significantly enhancing the enforcement effort against truly hard core pornography. We note that Congress, in enacting the present child pornography legislation, apparently agreed with this sentiment. As the Senate Committee on the Judiciary noted in 1977, "virtually all of the materials that are normally considered child pornography are obscene under the current standards . . . In comparison with this blatant pornography, non-obscene materials that depict children are very few and very inconsequential."

AAP is of course aware that the Supreme Court in Ferber upheld the constitutionality of New York's statutory scheme prohibiting the dissemination of materials depicting specified sexual conduct by a minor even where the materials are not legally obscene. In reaching its result, the Court determined not to interfere unduly with legislative judgments as to how best to proscribe the production of hard-core child pornography and thereby avoid the perceived detrimental impact upon children used as subjects of such pornographic materials. As we discuss below, the Court's opinions in Ferber did recognize the potential that a statutory scheme seeking to achieve such a result could improperly impinge upon the dissemination of materials of a non-pornographic nature which have serious literary, artistic, scientific or educational value. In responding to the Ferber decision with any new legislative initiatives, Congress must, we submit, not merely address the problem of child abuse arising out of pornographic depictions, but also must make provision for the unfettered dissemination of non-pornographic, socially-useful materials which may involve depictions of minors engaged in otherwise forbidden sexual conduct.

AAP's concern over the potential impact of amended federal child pornography legislation on the creation and distribution of important and responsible works is far from hypothetical. At least two works of which AAP is aware illustrate the problem. The first is a book entitled Show Me!, published in translation by the distinguished St. Martin's Press in 1975. Show Me!, authored by a Swiss child psychologist, was designed as a tool for parents to use in discussing sex with their children. This it attempts to do through explicit and realistic photographs and text. The book, while highly controversial, has been praised by educators and others as a valuable resource tool and has been

purchased and read by tens of thousands of families wishing to approach the subject of sexuality in an open, frank and uninhibited manner.

The second book, to be published by G. P. Putnam's Sons in the coming months, similarly deals with a mother's efforts to educate her daughter about female sexuality, and comprises both photographs and text.

Works such as the foregoing may be controversial, but they are neither pornographic nor exploitive. That one may agree or disagree with the ideas in, or manner of communication adopted by, such works is not the point; history teaches us that it is perilous to predict which ideas will one day achieve wide acceptance. Unless we are prepared to adopt the authoritarian view that controversial teaching tools such as Show Me! have no place in our society, provision must be made in the federal legislative scheme for such works to exist and be freely available.

If Congress is to consider, in light of the Ferber decision, eliminating the requirement from § 2252 of the Act that prohibited works must be "obscene" -- a key feature both in S.2788 and S.2856 -- at a minimum, provision must be made to exempt from the statute's coverage depictions of sexual conduct engaged in by minors that are contained in works that have serious literary, artistic, scientific or educational value. This approach finds support in the Ferber decision itself.

Each of the four opinions in Ferber recognized that the statute at issue in that case invited unconstitutional applications because, broadly applied, it covers depictions which do not threaten the harms sought to be prevented. Justices Brennan and Marshall expressly stated that application of such statutes "to depictions of children that in themselves do have serious literary, artistic, scientific or

medical value, would violate the First Amendment." They further opined that in the case of such depictions, the argument of harm to the child resulting from the creation of a "permanent record" of his participation "lacks much of its force." Similarly, Justice Stevens recognized that "a serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device, might include a scene from one of these films [proscribed by the statute] and, when viewed as a whole in a proper setting, be entitled to constitutional protection."

Further support for appropriately limited statutory language is found in the opinion of the New York Court of Appeals issued on remand of the Ferber case from the Supreme Court. In a concurring opinion joined by Judge Fuchsberg, Judge Meyer stated that he would, "as a matter of state constitutional law, recognize an affirmative defense for literary, scientific, educational, governmental or other similar justification." He further stated that in his view, "without such a defense, the chilling effect. . .upon serious depictions which do not actually threaten the harms addressed by that statute will cause greater harm to this state's interest in free expression than is constitutionally permissible."

Additional precedent for legislation containing similar saving language may be found in several state statutes, some of which were enacted in specific response to the Ferber decision. While some of these provisions are, in AAP's judgment, constitutionally deficient, they nonetheless reflect commendable attempts by various states to ameliorate the problem addressed herein.

For example, a bill was recently passed in Alabama to strengthen that state's child pornography law "by making certain changes permitted by a recent United States Supreme

Court decision." The statute prohibits knowing dissemination or possession with intent to disseminate "obscene matter" containing a visual reproduction of a person under the age of 17 engaged in various enumerated acts. The statute defines "obscene" as follows:

> (a) When used to describe any matter that contains a visual reproduction of breast nudity, such term means matter that
>
> 1. Applying contemporary local community standards, on the whole, appeals to the prurient interest; and
> 2. Is patently offensive; and
> 3. On the whole, lacks serious literary, artistic, political or scientific value.
>
> (b) When used to describe matter that contains a visual reproduction of an act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, genital nudity, or other sexual conduct, such term means matter containing such a visual reproduction which reproduction itself lacks serious literary, artistic, political or scientific value.

Similar, although more narrow, exceptions may be found in statutes in other states.[1]

AAP urges this Subcommittee, in its consideration of possible amendments to the present law, not merely to strike the obscenity requirement from § 2252, without more. For if publishers are to be deprived of the protection afforded by the present obscenity requirement -- which change in law we do not concede to be either appropriate or necessary -- a meaningful substitute that will preserve the opportunity to disseminate serious works otherwise falling within the statute's prohibitions must be devised. S.2856 makes a commendable effort to address the problem, in providing that exhibition of the genitals or pubic area of a minor falls outside of the statute if such exhibition has literary, artistic, scientific or educational value. But we submit that that language is inadequate.

For one thing, a showing of literary, artistic, scientific or educational value should protect depictions of "sexually explicit conduct" without regard to whether they involve merely nudity (as S.2856 contemplates) or some other conduct. From AAP's perspective, if depictions of nudity may

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1. Pennsylvania and South Dakota have statutes which except from their reach "materials involving only nudity, if such materials are made for and have a serious literary, artistic, educational or scientific value." South Dakota Statutes § 22-22-25; Pennsylvania C.S.A. § 6312(e). Likewise, the anti-child abuse law in Michigan contains, in its definition of "erotic nudity," a requirement that the nudity be displayed "in a manner which lacks primary literary, artistic, educational, political or scientific value and which the average person applying contemporary community standards would find appeals to prurient interests." Michigan C.L.A., § 750.145c (1)(d). Still another state, Massachusetts, allows an affirmative defense in any prosecution under its child pornography law "that such dissemination of any visual material that contains a representation or reproduction of any posture or exhibition in a state of nudity was produced, processed, published, printed or manufactured for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library. . . ." Mass. Gen. Laws, Ch. 272 § 29B.

be said to be justifiable and deserving of protection in certain instances, then it is difficult to condemn depictions of other types of sexual behavior that may equally be a part of legitimate educational or other desirable works. The book Show Me!, for example, contains several photographs which arguably depict not merely nudity but sexual exploration in the form of masturbation. Is it logical to conclude that the social value of Show Me! -- indeed, its very ability to be marketed -- should turn on precisely the form of sexual conduct depicted? We think not.

We further find inadequate the apparent intention, in S.2856, to apply the test of literary, artistic, scientific or educational value to individual depictions themselves, as apart from the works as a whole. We are frankly at a loss to understand how one would meaningfully determine whether a particular depiction of nudity, or other sexual conduct, standing alone, and outside of the context of the work of which it is a part, has educational, scientific or other value such that it would fall outside of the reach of the statute. In a book with scores of pictures and accompanying text, such as Show Me!, is the intention to view each photograph for its own intrinsic worth? AAP submits that the provision as drafted is both vague and lacking in meaningful protection for serious works containing non-pornographic depictions. We recommend instead a test that would focus upon whether the work in which the depictions appear, taken as a whole, has serious literary, artistic, scientific or educational value.

We finally find problems with the scienter test in § 2252(a)(1) and (2), on the assumption that the term "obscene" were stricken from the present language of (a)(1) and (a)(2). The present scienter requirement is meaningful in requiring the knowing transport, shipment, or receipt of

any obscene visual or print medium, as defined. In the absence of the term obscene, all that would be required would be the knowing transport, shipment, or receipt of any visual or print medium -- a meaningless scienter standard. We believe the statute, if amended to delete the obscenity requirement, should make clear that it is the transport, shipment, or receipt of materials with knowledge that such materials contain depictions prohibited under the statute that constitutes illegal activity.

Were the Subcommittee to adopt the foregoing suggestions, § 2252(a) might be amended to read as follows:

(a) Any person who -

(1) transports or ships in interstate or foreign commerce, or mails any visual or print medium, with knowledge that -

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct; and

(C) such visual or print medium, taken as a whole, lacks literary, artistic, scientific or educational value; or

(2) receives any visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, with knowledge that -

(A) the producing of such visual or print medium involves the use

of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct; and

(C) such visual or print medium, taken as a whole, lacks literary, artistic, scientific or educational value;

shall be punished as provided in subsection (b) of this section.

We thank the Subcommittee for its consideration of AAP's views on this important legislative subject.

Senator SPECTER. Mr. McCormack, and Mr. Rich, did you agree with the Court's holding in *Ferber?*

Mr. MCCORMACK. With the Supreme Court's holding of *Ferber?*

Senator SPECTER. Yes.

Mr. MCCORMACK. No, I did not. Because I thought that the Supreme Court did fail to draw the distinctions that are real between "Show Me" and books like it, and the Ferber film. I think they backed off a responsibility there. It is certainly hard to draw the distinctions and that is part of what we are doing here. But because they did not, because they simply said that the statute is constitutional as it stands, it seems to me that many good things have been banned, including "Show Me." So I cannot say that I agree to what the Supreme Court did in its entirety on *Ferber.*

Senator SPECTER. Mr. Rich, did you agree with the Supreme Court in *Ferber?*

Mr. RICH. Senator, the AAP is on record as having opposed the form of contraction of the first amendment which the Court in fact brought about. More difficult I think is the test——

Senator SPECTER. Would you state the factual basis of *Ferber* so that we may have it for the record? You are familiar with the case?

Mr. RICH. Yes, I think I am generally familiar with the case.

The case involved, as I understand it, two films which to most people's mind had little if any redeeming value of any kind. Nonetheless, those films were prosecuted under two provisions of the New York statute, one which required the State to demonstrate that they were legally obscene, which the jury refused to find in that instance; instead, Ferber was convicted under the statute which was reviewed by the Supreme Court which only required dissemination of the depicted conduct without there being a showing of legal obscenity. The film, as I understand it, depicted very gross acts by young, very young male children, masturbating and so forth, and I think it is some sort of miracle of sorts, perverted sort,

that these works were never found to be legally obscene, and one can speculate as to the reason.

Senator SPECTER. Do you think that had they been found legally obscene by the jury that the verdict would have been upheld by the Court on review?

Mr. RICH. I believe it would have without any question. I also would——

Senator SPECTER. Would you have agreed with the Court's decision upholding a verdict of obscenity in that case?

Mr. RICH. Let me only touch that by saying I have never seen the works themselves, Senator. My feeling is from the description that I read of the film that I would not have had any problem with anybody anywhere in the United States finding that those works were legally obscene.

Senator SPECTER. But you did disagree with the Court's conclusion when it held that it was not necessary to have a finding of obscenity but only a showing of those sexually explicit acts?

Mr. RICH. That is correct. And the basis for that, Senator, was our view of the traditional first amendment doctrine and the development of obscenity doctrine as it had developed to that point requiring that sexually oriented conduct of any sort had to be tested under the *Miller* standard. As you are fully aware, the Court departed from that in the case of child pornography.

Senator SPECTER. Well, there has been a longstanding evolution of the Court's thinking and really a double standard on obscenity which goes far behind *Ferber* cases. Some years back, the Court established a different standard for testing of obscenity as it relates to minors. Do you disagree with that approach, Mr. Rich?

Mr. RICH. No. We are entirely comfortable with the so-called variable obscenity standard, but I think it is important to distinguish in our minds between that which a minor ought to be able to perceive, which is where the variable obscenity standard comes in, that which a minor can purchase in your book store, which is what Ginsberg and other authorities in the variable standard dealt with, versus the very different purpose sought to be achieved here by the statute which is protecting against child abuse. They are really related but different concepts, and while I agree with you, Senator, that the Court has moved to a variable standard, I think it was addressing different kinds of activities.

Senator SPECTER. Mr. McCormack, when you published "Show Me," were you concerned at the time that you might be subject to criminal prosecution?

Mr. MCCORMACK. Yes, I thought I surely would be subject to criminal prosecution.

Senator SPECTER. But you have not been?

Mr. MCCORMACK. Yes, I have been.

Senator SPECTER. What is the status of the matter?

Mr. MCCORMACK. The book was published in 1975, and within a year or so, I was brought to court in three States and in Canada. In all four instances, the charge was obscenity and in all four instances the charge was thrown out and the book was exonerated.

Senator SPECTER. At the trial level?

Mr. MCCORMACK. At pretrial level in two of the States; at the third State, in New Hampshire, it went to trial level, and in Toron-

to it went to trial. All of the trials were before a judge rather than a jury, and I remember the one in New Hampshire in particular, the judge listened to two witnesses who persuaded the judge that they were honest, competent, sincere people commenting on the value of "Show Me." And he concluded therefrom that, all right, there can be controversy about this, there can be those who disagree with the book. But the very fact of controversy is almost a support for publishing it in any case he said. Clearly the book does have scientific and educational value. I have responsible people in front of me who have said so, and I can see a line of nine more who we have lined up to say further. So he stopped the case there. In Toronto it went all the way——

Senator SPECTER. If you only had three witnesses, you might have lost.

Mr. MCCORMACK. That is right. But they were innumerable. We could have had, it seemed to us—these nine were all from the New England area, and we have had people from across the United States, all the way from San Francisco to Portland, who are of varying degrees of credentials who support the book.

Senator SPECTER. Have any legal opinions been written on "Show Me"?

Mr. MCCORMACK. Legal opinions?

Senator SPECTER. Well, has any of the litigation produced an opinion by a court saying that "Show Me" does not meet any of the obscenity standards?

Mr. GAINSBURG. Yes. The Massachusetts court, which was the first case, produced an opinion which we would be glad to provide to the committee. This was the first case.

Senator SPECTER. Is that a reported opinion?

Mr. GAINSBURG. No. It is a nonreported opinion by Judge Nelson who is now——

Senator SPECTER. Trial court?

Mr. GAINSBURG. It was a trial court. It was a—Massachusetts has a preliminary hearing before you even go to trial where it is actually in rem against the book.

Senator SPECTER. It is a very unusual occurrence to have an opinion come out of a preliminary hearing.

Mr. GAINSBURG. Well, it is a very unusual case. It is a very unusual book.

There is an opinion which we would be glad to provide.

Senator SPECTER. I would like to see it.

[The following was received for the record:]

FILED IN DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
MAY 17 1976
JOAN GRAY, Court Clerk
BY _____ DEPUTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff,	)	
vs.	)	NO. CRM-76-1274
BETTY JANE ROBINSON, Defendant.	)	

ORDER

THIS MATTER came on for hearing this 14 day of May, 1976 upon the Demurrer and Motion to Quash of the defendant. The State appeared by and through Assistant District Attorney Mark Blasdel, and the Defendant appeared in person and by and through her attorney, Philip F. Horning of the firm of Bulla, Horning, Johnson & Glasgow. No testimony was presented by either side, but the book SHOW ME! A PICTURE BOOK OF SEX FOR CHILDREN AND PARENTS, which is published by St. Martin's Press, New York, New York, and which is the subject of the instant charge "Sale of Obscene Literature" under 21 O.S. 1040.8 which was an exhibit to the Defendant's brief previously filed herein, is admitted into evidence for the purpose of this hearing.

Oral argument was offered on behalf of the defendant in support of the Demurrer and Motion to Quash, and oral argument was heard in opposition thereto from the State. Both sides thereafter rested.

After considerable deliberation made possible by the fact that this hearing has twice been continued, and after careful examination of the book which is the subject of this action, and after examination of the court file herein and consideration of the oral arguments of both parties, the Court finds, and it is therefore ordered as follows:

1. The book which is the subject of this action is not an obscene book within the definition set out by the United States Supreme Court in Miller vs. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), as adopted by our Court of Criminal Appeals

in McCrary vs. State, 533 P.2d 629 (Okl.Crim. 1974). On the contrary, while the bock does depict ultimate sexual acts in a very few of the many photographs contained within it, the book taken as a whole does not appeal to a prurient interest in sex, does not portray sexual conduct in a patently offensive way, and does have serious literary artistic and scientific value.

2. In so holding, this Court joins with other trial courts in the States of Massachusetts and New Hampshire which have held similarly on the same issues involving the same book.

3. By so holding, this Court determines that there is no factual issue which would require a jury determination and finds this case falls within the meaning of the United States Supreme Court when it stated ". . . it would be a serious misreading of Miller to conclude that juries have unbridled discretion in determining what is 'patently offensive'." Jenkins vs. Georgia, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed2d 642 (1974).

4. In light of the above, Defendant's Demurrer is sustained and this case is dismissed.

IT IS SO ORDERED this 14 day of May, 1976.

/s/ Creston B. Williamson
CRESTON B. WILLIAMSON
SPECIAL DISTRICT JUDGE

[illegible] is a true, [illegible] attached hereto [illegible] to the District Court [illegible] County, Okla. this 17 day of May, 19 76
ANN GRAY, Court Clerk
By [illegible] Deputy

Commonwealth of Massachusetts

MIDDLESEX, ss. 11 SUPERIOR COURT
No. 75-6471

JOHN J. DRONEY, District Attorney

-v-

A BOOK NAMED "SHOW ME!"

FINDINGS OF FACT, CONCLUSIONS OF LAW

(Supplementary Memorandum)

Findings of Fact

1. John J. Droney, District Attorney, Middlesex County, files this petition under the provisions of General Laws, Chapter 272, Section 28C, a book obscenity statute, merely seeking to obtain an order of notice directed against the book named "Show me!".

2. This particular section reads, in part:

> "Whenever there is reasonable cause to believe that a book which is being disseminated, or is in the possession of any person who intends to disseminate the same, is obscene, the attorney general, or any district attorney within his district, shall bring an information or petition in equity in the superior court directed against said book by name. Upon the filing of such information or petition in equity, a justice of the superior court shall, if, upon a summary examination of the book, he is of opinion that there is reasonable cause to believe that such book is obscene, issue an order of notice, returnable in or within thirty days, directed against such book by name and addressed to all persons interested in the dissemination thereof, to show cause why said book should not be judicially determined to be obscene. Notice of such order shall be given by publication once each week for two successive weeks in a daily newspaper published in the city of Boston and, if such information or petition be filed in any county other than Suffolk county, then by publication also in a daily newspaper published in such other county. A copy of such order of notice shall be sent by registered mail to the publisher of said book, to the person holding the copyrights, and to the author, in case the names of any such persons appear upon said book, fourteen days at least before the return day of such order of notice. After the issuance of an order of notice under the provisions of this section, the court shall, on motion of the attorney general or district attorney, make an interlocutory finding and adjudication that said book is obscene, which finding and adjudication shall be of the same force and effect as the final finding and adjudication provided in section twenty-eight E or section twenty-eight F, but only until such final finding and adjudication is made or until further order of the court."

The remaining provisions of this section concerns itself with defenses available to the defendants. It is the quoted statement of that section that the Court herein considers.

3. The plaintiff gave informal notice to the publishers and stipulated to the filing of appearances in this part of the proceedings. The Court takes it that these appearances by stipulation allowed for oral argument, but the Court notes that the plaintiff specifically objected to the admission and acceptance of affidavits and memoranda in support of the defendant's cause.

4. The Court has not availed itself of any of the defendant's proffered memoranda or affidavits, and finds all its facts based only on the review of the book itself. (See Conclusions of Law, No. 1.)

5. The Court is required to determine whether there is reasonable cause to believe that the book "Show Me!" is obscene. The dissemination and intended dissemination have been established, leaving the only issue one of obscenity. The definition of obscenity is for this purpose contained in Section 31 of Chapter 272. There "obscene" is described accordingly:

> "'Obscene', matter is obscene if taken as a whole it
> (1) appeals to prurient interest of the average person, applying the contemporary standards of the commonwealth;
> (2) depicts or describes sexual conduct in a patently offensive way; and
> (3) lacks serious literary, artistic, political or scientific value."

6. All the terms of the statute are not explicitly defined, particularly such words of art as "prurient" and "patently offensive". However, there is reasonable cause to believe that insofar as the material in this book illustrates almost all of the acts of sexual conduct as specifically defined in Section 31, this book "taken as a whole" may fulfill part (1) and part (2) of the meaning of obscenity, and further taking of evidence and argument may be necessary to determine this. (See cited cases in accompanying memorandum.)

7. The book may be described as large (some nine inches by thirteen inches) with its plain hard cover embraced by a paper cover depicting two young children beneath the title "Show Me!". This cover

describes the book's contents as "A Picture Book of Sex for Children and Parents. Photography and Captions by Will McBride. Explanatory Text by Dr. Helga Fleischhauer-Hardt. St. Martin's Press." The back of the paper cover carries certain attestations of its value as a sex education book by a physician and a director of curriculum development.

8. This book, advertised for sale at $12.95, contains a series of sixty-nine double-paged photographs, plus the entire series repeated in summary and considerably reduced in size. Sexual conduct is generally portrayed throughout the series, and ranges in depiction of sexual activity from pictures of sex organs of children and adults, male and female, to photographs of sexual intercourse, masturbation and oral sex involving children as well as adults.

9. Each of the pictures are entitled or captioned or accompanied by a description of the activity being portrayed. All of this is followed at the back of the book for some thirty or more pages with an explanatory text. This text attempts to explain how to use the book, descriptions of the sexual anatomy, pedagogical considerations, definitions, statistics, and a bibliography of materials on sex education for children.

10. Upon examination of this book, the Court finds that although the material may appeal to prurient interest of the average person applying the contemporary standards of the Commonwealth, and may depict or describe sexual conduct in a patently offensive way (both matters for presentation of evidence and factfinding) the Court cannot find and does not find that the book, taken as a whole, lacks serious literary and scientific value.

Conclusions of Law

1. The statute and case authority in Massachusetts have not provided any guidance as to the propriety of allowing the taking of evidence or use of affidavits and legal memoranda to aid the Court in deciding the issue before it. In any event, the plaintiff's motion to

strike all affidavits and exhibits attached thereto submitted by the publisher of the book entitled "Shoe Me!" is allowed. State v. "I, a Woman-Part 2", 53 Wisconsin 2d 102 (1972).

2. Upon "a summary examination" of the book, and in view of the findings of fact, the book "Show Me!" is not within the definitions of the statutes and case law and is not obscene.

WHEREFORE, the plaintiff's petition for an order of notice is denied and the petition is dismissed.

Elwin Shelson
Justice of the Superior Court

Entered: January 6, 1976.

Commonwealth of Massachusetts
MIDDLESEX, ss. SUPERIOR COURT

In testimony that the foregoing is a true copy on file and of record made by photographic process, I hereunto set my hand and affix the seal of said Superior Court, this sixth day of January 1976

Helen Ward
Assistant Clerk

Commonwealth of Massachusetts

MIDDLESEX, ss. 12 SUPERIOR COURT
No. 75-6471

JOHN J. DRONEY, District Attorney

-v-

A BOOK NAMED "SHOW ME!"

SUPPLEMENTARY MEMORANDUM OF LAW

I am aware of the several difficult issues raised by my findings. These issues derive from the somewhat vague and silent treatment the statute gives to the appropriate procedure for determining this preliminary test of "reasonable cause". I have

taken it that in order to determine reasonable cause, one must be satisfied that the book is either obscene or that, using a much more liberal test, reasonable persons may differ as to whether or not the book is obscene.

I feel compelled to conclude from reading numerous cases of the Supreme Court of the United States and those of our own Supreme Judicial Court, that this procedure is not to be one of rote, whereby one automatically determines the issue favorable to the plaintiff, but rather, in order to protect citizens' rights under the First Amendment of the U. S. Constitution and our own Declaration of Rights, that the Court is required to apply the constitutional test of obscenity in the preliminary stages of these proceedings. I think this is particularly so in light of the fact that there is no procedure outlined by the statute that permits an adversary proceeding right from the beginning. Therefore, obscenity becomes only that which is claimed by the plaintiff, and this can result in dire consequences for the defendants specifically, and publishers and distributors in general. The statute permits, for example, that an interlocutory order, which has, at least temporarily, the full effect of a final order, to be automatically issued upon a request of the Commonwealth. This same order may be used not only to prohibit the publication and dissemination of the material, but the finding of obscenity contained therein may be used in evidence in any subsequent criminal proceeding. Certainly the courts have dealt with this question before. See Freedman v. Maryland, 380 U. S. 51; Blount, Postmaster General, et al v. Rizzi, d/b/a The Mail Box, 400 U.S. 410; State v. "I, a Woman-Part 2", 53 Wisconsin 2d 102 (1972). However, it is not clear from any of the decisions in our own jurisdiction that this part of the statute will pass constitutional muster. I am not called upon to determine the constitutionality of the statute and do not. Nevertheless, it appears incumbent upon me to keep in mind the possible chilling effect that this action may have on the publication of this and any other book that is controversial, particularly in the

light of my finding that even a cursory examination of the book allows for the determination that it has serious literary and scientific value.

As one more aside, this part of the statute in issue here seems to provoke constitutional contention. Taking it that Section 28C precludes an opportunity for an adversary hearing, the procedure becomes like a request for an arrest or search warrant rather than a probable cause hearing in criminal procedure (G.L. C.218, s.30; and s.35A). The former suggests the necessity of acting in camera and with dispatch; the latter suggests safeguards against precipitous, costly and unfair prosecution. Because of the eminent position of those ideals sought to be preserved by the constitution, it would seem that a provision for initial opportunity for an adversary hearing is clearly appropriate without impinging upon the urgency of the complaint.

As to the book itself, this hardly seems to be an instance of "commercial exploitation of obscene material" which the state may reasonably and constitutionally outlaw. Miller v. California, 412 U. S. 15 at 35. Rather, it is a work that will and has evinced great debate over its educational, literary and scientific quality.

In fact, the Court is concerned that this question raised by the plaintiff could well give rise to exploitation for purposes other than that which the book has been promoted. It is not unlikely that a finding of obscenity merely puts this book into other channels and other markets not purposed for literary, scientific or educational value. Frankly, it appears to me that the issue is really not one of obscenity, indeed, but one concerned with the efficacy and propriety of sex education attempted in this manner. That question is an educational and moral one, engaging personal preferences and parent-teachers' judgments. "First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or the majority of the people approve the ideas these works represent." Miller v. California, supra, at 34; Roth v. The United States, 354 U.S. 476 at 484.

Obscenity has to do with "dirty books" serving no purpose of value and not protected by the First Amendment. Roth v. United States, supra. If called upon to do so, I would find the book distasteful and ineffectual and promoting an attitude that is personally offensive. My own appraisal of the book, for whatever my own subjective judgment is worth (for legally it is worth nothing) is summarized succinctly on page 73 of that book, as verbalized by a young child: "YICHH".

David Shelson
Justice of the Superior Court

Entered: January 6, 1976.

Commonwealth of Massachusetts
MIDDLESEX, ss. SUPERIOR COURT

In testimony that the foregoing is a true copy on file and of record made by photographic process, I hereunto set my hand and affix the seal of said Superior Court, this seventh day of January 197 6

Assistant Clerk

Mr. McCORMACK. There is an extended opinion from the case in Toronto, if that would be of any interest to you. I realize that it is from outside the United States, but the judge did listen to a whole trial.

Senator SPECTER. We would be interested in that as well.

Mr. McCORMACK. All right.

[The following was received for the record:]

478-76

IN THE COUNTY COURT JUDGE'S CRIMINAL COURT
IN AND FOR THE JUDICIAL DISTRICT OF YORK

HER MAJESTY THE QUEEN

- vs -

THE MACMILLAN COMPANY OF CANADA, LIMITED,

Accused.

Before: His Honour, Judge GRABURN

Appearances: C. LEWIS, Esq., for the Crown
W.B. WILLISTON, Q.C., for the Accused

The Court House
361 University Avenue
Toronto, Ontario

July 16, 1976

REASONS FOR JUDGMENT (delivered orally)

GRABURN, J.:

In this case, which involves important community values, The MacMillan Company of Canada Limited is charged that it, within three months ending on or about the 2nd day of October in the year 1975, at Toronto, had in its possession for the purpose of distribution, obscene books, to-wit: copies of a hard cover book titled "Show Me", contrary to the Criminal Code.

MacMillan elected trial in the County Court Judge's Criminal Court and pleaded, through its authorized agent, not guilty to the charge.

No question arises as to the corporate identity of the accused; and pursuant to the provisions of s. 582 of the Criminal Code, counsel for MacMillan admitted that at the time and place referred to in the indictment, the accused company had in its possession for the purpose of distribution copies of a book titled "Show Me".

Accordingly the sole issues in this trial are whether the book "Show Me" is obscene and/or whether the company's possession of the book for the purpose of distribution served the public good.

"Show Me", a book containing photographs and explanatory text, is styled on the dust jacket "A Picture Book of Sex for Children and Parents". The evidence further indicates that the photography, captions and design were by Will McBride, an American photographer, and the text by Dr. Helga Fleischhauer-Hardt, a doctor practising in Switzerland, about whom I shall have more to say.

The photographs were taken in Munich and the book originally published in Germany in 1974. The English language edition was published in New York in 1975 by St. Martin's Press. The accused company distributed the book in Canada, the police seizing a number of copies at a well known book store here in Toronto. The police ascertained from a representative of the accused company that 4,000 copies of the book had been distributed in this country, not only in Ontario but in Quebec, Manitoba, Alberta and British Columbia.

The book is packaged in cellophane and retailed in Toronto for $14.95.

Counsel for MacMillan pointed out that before any complaints had been received by the police concerning the book, the Crown Attorney for this City threatened MacMillan with prosecution in the event the book was not withdrawn. MacMillan nevertheless decided to continue to distribute the book, with consequent complaints from

members of the public who for reasons of their own chose to remain anonymous. Hence the prosecution and this case.

I turn now to a description of the book itself. It is a large "coffee table" type format, measuring some 9-1/2 x 13-1/2 inches. The front dust jacket reveals a photograph of two nude children, boy and girl, ages (I would gather) between six and nine. The inside of the front jacket gives information as to the contents of the book. To set out certain passages:

> "[It]. . . is an explicit, thoughtful and affectionate picture book designed to satisfy children's curiosity about sex and sexuality -- their own as well as that of their elders. In a series of sixty-nine beautiful double-page photographs, accompanied by a running commentary assembled from actual reactions of children to the photographs, it explains and illustrates sexual development from infancy through adulthood. An illustrated text at the back of the book spells out the educational, ethical and psychological significance of the pictures, and supplies complete information on human reproduction, love, sexuality, sexual experimentation and marriage. This explanatory section, by a noted child psychologist, will help parents discuss with their children the pictures in the earlier part of the book."

The back of the dust jacket contains a brief biography of the authors as well as endorsations of the book by medical and religious notables.

The Foreword at pages 3 and 4 deserves full quotation.

> "We have made this book for children and parents. In their hands it can be an aid to sexual enlightenment. But above all we hope it will show parents that natural sexuality develops only when children are surrounded from birth

onwards by a loving family and environment which does not repress sexuality. We don't believe a child will have 'found the answer' to sex simply by looking at the pictures in this book. A good understanding requires rather a continuing exchange between parent and child, a dialogue which helps the child express his questions and problems concerning sex and resolve them. The photographic part of this book is meant as a taking-off point for parents. Internal bodily processes such as conception and pregnancy as well as anatomical facts should be presented to the child in simple words by the parents themselves. The text at the end of the book makes suggestions for this purpose. It gives parents basic information on the development of sexuality and sex education. We are of the opinion that only an explicit and realistic presentation of sex can spare children fear and guilt feelings related to sexuality. For this reason we chose photography as a medium. With much care and under great difficulty we succeeded in photographing the children in such a way that their natural behavior came through. We thank the children and their parents for their help in putting together the photographs. The captions to the pictures are gathered from their spontaneous comments. We hope this book will serve parents and children as a source of information and guide them toward a happy sexuality marked by love, tenderness and responsibility."

There follows 69 double-page photographs, each of which save one depicts human beings wholly naked or their genitalia. The first seven photographs show a boy and a girl, aged (I would gather) between six and nine, discussing their anatomical differences. The next three

photographs concern a mother showing tenderness to and breast-feeding her baby, as seen through the eyes of, and discussed by, the aforementioned children. In the next photograph the mother comforts the boy whose world has been invaded by a new baby brother. The next photos involve another child, aged (I would estimate) between one and two, exploring her mother's breasts, and being held lovingly in the latter's arms. In the ensuing two photographs, the boy who feels resentment to the new intruder holds the baby and contemplates how he was in his own infancy. This is followed by a child wrestling with his father.

On page 36 there is shown the external female genitalia, and it contains a pejorative caption with an older male and female person apparently expressing disapproval. In the three photos subsequent, the vulva, penis and external excretal parts of the body appear, with comments respecting their essential differences, although the common feature of the latter as to boys and girls is stated. As to the latter, the abovementioned elderly people gaze disapprovingly from the caption.

The picture at page 44 is merely a full face view of a young girl, aged (I would estimate) between five and six, captioned: "Look what I can see. But I don't want to see it any more."

An erect penis is then shown, with a piece of cloth draped over it. And whatever else may be said about the book, I fail to comprehend how its internal necessities are served by this inclusion. There follows penises in the ordinary state and photographs illustrating the difference between circumcision and the lack thereof, which take up the following double pages.

An inquiry from the boy who appeared at the beginning of the photographic section as to when he will acquire pubic hair and genitals like his father, with relevant pictures, will be found at pages 52-55; and then a young girl who, I surmise, is the same girl shown full

face at page 44 is shown to be asking what two girls obviously past puberty are doing, as they are hugging one another. This leads into a query as to whether she will have large or small breasts and then culminates in a photo of a boy, very much in adolescence, with an erection touching the breasts of an adolescent girl, and presumably the same girl holding the same boy's penis, all with appropriate captions.

The young girl whose questions and queries underlay the sequence of photographs that I have just described, then discloses (with accompanying photography) that she would like to have a baby but demurs at the idea of having the boy who appeared in the first seven photographs enter her vagina when they are grown up. Sequentially, she initially demurs at the sight of a couple, again probably aged between 14 and 16, preparing for sexual intercourse, although she finds goodness in the touching which is said to be part of the lovers' world. She then dwells on the topic of female masturbation as it involves her older sister and finds it to be beautiful. The boy then comments on male masturbation as related to him by his older brother, all of which is graphically shown in the photographs.

The penis shown in this section is, although not grossly so, considerably enlarged in size.

At page 88 a close-up of the introitus and vagina appears, followed by five photographs of preliminary love play between a couple described as the boy's older brother and his girl friend. The photograph at page 96 in which the girl friend holds the brother's penis is grossly enlarged.

The preliminary love-making series of photographs is accompanied by captions where the elderly man expresses shock and dismay at the activities portrayed, which include an act of fellatio. The elderly man is referred to by the children as "an old crab! And just 'cause those two are in love and are making out with each

other". The children express complete approval not only of the preliminary love-making, but also of the sexual intercourse which follows.

The young girl who expressed a wish to have a baby is reassured by her mother that the couple's sexual intercourse stems from the fact that they are in love, but the girl expresses fear of a penis in her vagina, as she earlier had done. Two photographs, one of which would be hopelessly incomprehensible if taken out of context, illustrating a close-up of sexual intercourse then follow, with the mother assuring the girl that sexual intercourse only occurs when people are older. The girl appears content and happy with her mother's explanation.

At page 118 the elderly man states: "Dreadful, the things they tell children these days."

Nine photographs follow dealing with childbirth, two of which most effectively catch the accompanying pain and four of which equally catch the ensuing happiness of childbirth.

The photographic part of the book ends with the children who appeared at the commencement of the photographic odyssey expressing their wishes to be like their parents -- the boy like his father; the girl, her mother.

The textual section of the book by Dr. Fleischhauer-Hardt consists of 28 pages, commencing with how to look at "Show Me" with parents and children. An excerpt from the first page of the explanatory text is indicative of the author's approach. (I am reading from page 143 of the book.)

> "To avoid introducing repressions and new inhibitions regarding sexual matters, the adult should explain the photographs and encourage the child to talk about the feelings they bring about in him.
>
> "Parents who feel that the book is good, but hesitate to show it to their seven- or

eight-year-old, do so almost certainly because they fear they might impart to their children anxieties about their own sexual feelings or behavior patterns. Parents can easily overcome their fear if they go through the book section by section, looking at the photographs slowly and carefully and not showing them all at once to the children. In this way parents will give themselves and their children the opportunity to gain confidence in the material, little by little. The most important parts of this process remain conversation, explanation, openness on the part of adults, and their readiness to answer all of the children's questions."

Sex education and development is then discussed, not in depth but in a manner adequate to alert the parent to the necessity of and the pitfalls in developing a capacity for love in terms of what the authors call "basic social trust". The text deals with this concept in the spectrum from infancy to late adolescence. The text encourages the exploration by the child of his or her body.

I refer now to an excerpt from pages 151-152 of the book, and I am quoting:

"It is perfectly natural for young children to play with their excretory and sex organs a good deal during the period when they are learning cleanliness. In the experience of young children, the two still form a single unit. Parents should be aware of this and should not interfere with their children's attempts to explore their bodies and functions, but rather encourage them by explaining where excrement comes from, where it emerges, and where it can be deposited. They should also allow children the opportunity of playing naked. Playing with the anal zone gives small children feelings of

pleasure. Their perceptions are far removed from the attitude of most adults, who frown upon such 'shocking' behavior.

"As a rule, children in Europe and America are forbidden to play with their excretory and sex organs. This creates unnecessary inhibitions in the child's curiosity and play. When they disobey the rule -- as they inevitably will -- they experience feelings of anxiety and guilt. Understanding parents can spare their children such conflicts by not restricting or forbidding these pleasurable activities, but rather accepting them in a friendly way like other games."

Dr. Fleischhauer-Hardt cautions against threats of castration, even as a joke, in an attempt by a parent to curtail her son's playing with his genitals.

She also discusses situations which may arise out of variations upon Freud's "oedipus complex". Conceding Freud's assertion of the unconscious love of a boy for his mother and a girl for her father (and consequent jealousies) not to be scientifically demonstrable and to be disagreed with by many psychologists, she discusses family situations with Freudian overtones which may be encountered, and she offers certain suggestions as to how these situations may be handled.

As to sexual games involving children, Dr. Fleischhauer-Hardt writes (at page 156):

"The behavior patterns of these children who grow up without any sexual restriction may be regarded as the natural sexual behavior which occurs spontaneously during infantile development.

"In our own culture, where children's sex games are still largely suppressed, children's sexual activities include playing with their own genitalia and role-playing games such as 'Mommy, Daddy, and Baby' and 'Doctors and Nurses'.

"It is not yet known exactly what significance a trial-and-error learning process in childhood may have for mature sexual relationships in humans, but we do know that in several species of primates it is essential for the young males and females to play sexual games so that they are able to perform copulation correctly in maturity. This, together with similar evidence in other animals, suggests that personal experience in childhood in the form of play-sexual activities may indeed be extremely important for mature sexual behavior.

"If parents show tolerance toward the sexual games which are a natural part of infantile development, they can preserve and strengthen the child's positive attitude to his own sexuality and that of others. It is therefore unwise for parents to be upset when their children indulge in sexual activities. The problem is most easily solved if they openly allow the children to play sex games, so that they are not forced into secrecy.

"Problems may arise if prudish neighbors or a playmate's parents have sexually repressive attitudes. In this case it is important to have an open talk with the adults concerned. If this does not lead to a more tolerant attitude on their part, if, for example, the other parents forbid their children to take part in sexual games, then the subject must be talked over with one's own children. Here parents may explain that under these circumstances games like 'Doctor and Nurse' should only be played at home.

"If children are confident that their parents do not forbid sexual play but tolerate it just as happily as other games, then they will also quite spontaneously come to their

parents with all their questions about differences between men and women, reproduction, birth, and pregnancy. In this way sexual instruction will come about simply and naturally for both parents and children."

The written material treats of the question of children coming into the bedroom when their parents are having sexual intercourse. Clearly, the locked door approach is frowned upon by Dr. Fleischhauer-Hardt; and she writes (at page 157):

"It is unfortunate that many parents are reluctant to allow their children free access to their bedroom. There is no doubt that a locked bedroom door arouses the curiosity of young and older children beyond all measure. What is more, a locked bedroom door encourages all sorts of fantasies and wrong ideas about adult sexuality in the children's minds. They will see it as something forbidden, something that takes place in secrecy.

"A well-informed child will not be shocked to see his parents having sexual intercourse; to such a child sex is a positive sphere of life, determined by love and tenderness.

"How should parents behave when their child discovers them making love? As a rule even the most tolerant and liberated parents are disturbed and will stop making love. But still the child will have noticed that they are 'doing something'. He will ask curiously, 'What are you doing?' The best reaction is for the parents to answer affectionately, 'We love each other very much right now.' Perhaps they will ask the child to leave them alone. A well-informed child will probably react to this situation by going back to his brothers and sisters and saying,

'Mommy and Daddy are in love with each other,' or 'Maybe we'll have another baby soon.' And as far as the child is concerned, that is the end of the matter."

A substantial part of the text concerns suggestions meant to help parents inform their children about sex, as a starting point for simple, basic sexual instruction. The divisions are:

(1) Sexual Differences between Boys and Girls;

(2) Love between Man and Woman (and a brief reference to contraception);

(3) Marriage and Family;

(4) Pregnancy and Childbirth.

The physiology of puberty, as it occurs in both sexes, and to a lesser though adequate extent its psychological implications are discussed, as well as the question of anxiety and conflict arising out of initial non-marital sexual intercourse. The prevention of venereal disease is stressed.

The author sounds a warning in the text that non-repressive sex education is not to be taken as an invitation to licentiousness. At page 170, Dr. Fleischhauer-Hardt cautions:

"Modern Western society is still far removed from a natural, affirmative approach to pleasurable sexuality. Sexual wishes and drives are still suppressed and manipulated in innumerable ways. For instance, masturbation is often recommended to adolescents as the best way out of their sexual predicament. But if masturbation is the only form of sexual activity practiced over a period of several years, it may result in an impoverished emotional life, for masturbators isolate themselves in situations where the only objects available to satisfy their sexual desires are their own selves. This excludes the possibility of a sexual partnership and a tender

relationship with another human being. Also, continual petting that does not lead to orgasm creates physical and psychic tension which may eventually inhibit normal sexual reactions.

"We must also bear in mind that training and practice are necessary in the development of any ability. There seems to be no reason why practice of sexual behavior should be prohibited, and modern sex education cannot ignore this consideration. The same opportunity for free development of spontaneous sexual activity that we called for in childhood and prepuberty must also be available in puberty.

"On no account must nonrepressive sex education be equated with the recommendation of indiscriminate indulgence in sex. Freedom calls for the ability to act responsibly. It is mainly up to parents and teachers to convey this ability to children. Alex Comfort comments in his book Sex in Society, 'It is virtually impossible to persuade a child by lecturing that sexuality is a perfectly worthy component of life, and that its exercise calls for the same reasonable restraint as other social conduct, if we ourselves are inhibited or irresponsible.'"

The Afterword, also written by Dr. Fleischhauer-Hardt, restates the object of the book and her thesis. I set out the Afterword in its entirety (page 171):

"This book is aimed at open-minded people who are prepared to rethink and perhaps even question their own attitude to human sexuality. The book came about as a result of my experience that many parents are not sufficiently informed about sexual matters to understand the sexual development of their children correctly. In many cases they are not even thoroughly informed or aware of their own sexuality, because everything

to do with sex was suppressed in their own upbringing.

"The primary aim of this book is to finally do justice to the sexual needs of children and adolescents. This goal can only be reached by instructing adults thoroughly and realistically. Will McBride's photos portray sexual behavior in relation to physical maturity from birth to adulthood. The photos show most of the usual forms of sexual activity. For those children and adolescents who have as yet had little experience, the pictures offer at least a graphic introduction to sights and activities they will see and practice later in life.

"We are relying on the wisdom, insight, and tolerance of parents and teachers in the hope that Show Me! may contribute to the sexual liberation of children and adolescents."

The explanatory text is accompanied by photographic captions. A substantial number of the photographs are reproduced from the pictorial section of the book. However, there are significant additions: a boy with his finger in his anus; an act of cunnilingus; a young child under the legs of two young people. As was the case in the pictorial section, the people shown in this section are all naked. Abundant photographs of male and female genitalia and sexual intercourse are included, as well as photographs conveying a message of family warmth and unity. Masturbatory action, both male and female, is reproduced.

The book contains an Appendix, dealing in detail with contraception and to a lesser extent venereal disease. Shorter sections concern homosexuality and sexual behavior disturbances.

On the last page of the book Will McBride describes the mechanics of the photography, and he writes:

"The models were all friends. Except for the coitus scenes, mothers and fathers of the

children were present and helpful during the photographic sessions."

It must be emphasized that in the photographic division of the book, the captions indicate that in many instances the younger children are watching or have had related to them the sex play of the older boys and girls and young adults; also, in the photographic caption in the text illustrating anal exploration, there may be another person present.

Although my description of the book has not been brief, nevertheless it is not as detailed as I would have liked it to be. I have tried, however, to capture sufficient of the "flavour" and the message to do justice to the submissions of counsel and to paint in perspective those contentious parts against a canvass of the evidence and the law.

I turn now to the law applicable to this case.

The accused company is charged pursuant to s. 159(1)(a) of the Criminal Code, which provides, so far as is relevant to this case:

> "Every one commits an offence who . . . has in his possession for the purpose of . . . distribution . . . any obscene written matter . . . ."

The Defence submits that the book "Show Me" is not obscene, and in any event the public good is served by its publication and distribution, a defence provided for in subsections (3) and (4) of s. 159.

"Obscenity", as far as this trial is concerned, inasmuch as no suggestion has been made that the Hicklin case has any application to the issues here, is defined in subsection 8 of s. 159 as follows:

> "For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex . . . shall be deemed to be obscene."

The Crown contends that the following sections of the Criminal Code are germane to the issues here:

I refer now to sections 157 and 158 of the Criminal Code. Section 157 provides:

> "Every one who commits an act of gross indecency with another person is guilty of an indictable offence."

Section 158(1) provides that s. 157 does not apply to

> ". . . any act committed in private between a husband and his wife, or any two persons, each of whom is twenty-one years or more of age, both of whom consent to the commission of the act."

Subsection (2):

> "For the purposes of subsection (1), an act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present."

The sole issue, as I have indicated earlier, is whether "Show Me" is obscene or whether the company's possession of the book for the purpose of distribution served the public good.

The law pertaining to obscenity has been articulated in four cases: first, the case of Brodie, which was decided in 1962 and is reported in 37 C.R. 120; second, the case of Dominion News, decided in 1963, reported in 42 C.R. 209 (both judgments of the Supreme Court of Canada); C. Coles Books (1964), 44 C.R. 219 (a judgment of the Ontario Court of Appeal); and the Prairie Schooner case, reported in 1970, in 1 C.C.C.(2d) at page 251 (a judgment of the Manitoba Court of Appeal).

I apprehend the law, as distilled from these cases, to be:

To determine whether a dominant characteristic of a book is the undue exploitation of sex, regard must be had (1) to the book as a whole and not to isolated photographs and passages from the text and captions, and (2) to

the purpose of the authors. Was their purpose a serious one, or was their purpose merely base exploitation? On the issue of a dominant characteristic, the evidence of witnesses skilled in the subject of the litigation is admissible.

The law assumes that there will be a certain exploitation of sex in obscenity prosecutions, and thus what is proscribed is the "undue" exploitation of sex. "Undue" is to be measured against two criteria: (1) the internal necessities of the book itself, and (2) contemporary Canadian community standards.

In relation to the standard of the internal necessities of the book itself, the remarks of Judson J. in Brodie at page 144, although dealing with a novel ("Lady Chatterley's Lover"), are nevertheless apposite:

> "The use of the word 'undue' recognizes that some exploitation of the theme is of common occurrence. What I think is aimed at is excessive emphasis on the theme for a base purpose. But I do not think that there is undue exploitation if there is no more emphasis on the theme than is required in the serious treatment of the theme of a novel with honesty and uprightness.
>
> "That the work under attack is a serious work of fiction is to me beyond question. It has none of the characteristics that are often described in judgments dealing with obscenity -- dirt for dirt's sake, the leer of the sensualist, depravity in the mind of an author with an obsession for dirt, pornography, an appeal to a prurient interest, etc. . . . I agree with the submission of counsel for the appellant that measured by the internal necessities of the novel itself, there is no undue exploitation."

Now before analyzing the law pertaining to community standards, by way of parenthesis, it ought to be said that obscenity and pornography are not synonymous the one with the other. In that regard see Odeon Morton Theatres et al. (1974), 16 C.C.C.(2d) 185, a judgment of the Manitoba Court of Appeal, delivered by Freedman, C.J.M. In my view, the word "pornography" has no precise, fixed legal meaning, but is frequently associated with the stag movie wherein the beauty of sex is wholly denigrated by purely lustful conduct designed solely to titillate and arouse, or with books and pictures devoted to violence and sex, or advocating commonly accepted sexual perversions such as bestiality, or where sexual activity is treated in a revolting and disgusting manner -- an example (and one example only) of which would be necrophilia.

Clearly, if this is what pornography is, a book may be obscene without being pornographic, although the converse would not ordinarily be true.

As to the determination of contemporary Canadian community standards and the approach to be taken in a prosecution of this nature, I refer to the dissenting judgment of Freedman J.A. (as he then was) in Dominion News and Gifts (1963), 40 C.R. 109, adopted in toto by the Supreme Court of Canada on appeal and reported in 42 C.R. 209. In the report in the Manitoba Court of Appeal, at pages 126-127, Mr. Justice Freedman stated:

> "Those standards are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered. Obviously this is no easy task, for we are seeking a quantity that is elusive. Yet the effort must be made if we are to have a fair objective standard in relation to which a publication can be

tested as to whether it is obscene or not. The alternative would mean a subjective approach, with the result dependent upon and varying with the personal tastes and predilections of the particular judge who happens to be trying the case.

"Community standards must be contemporary. Times change, and ideas change with them. Compared to the Victorian era this is a liberal age in which we live. One manifestation of it is the relative freedom with which the whole question of sex is discussed. In books, magazines, movies, television, and sometimes even in parlour conversation, various aspects of sex are made the subject of comment, with a candor that in an earlier age would have been regarded as indecent and intolerable. We cannot and should not ignore these present-day attitudes when we face the question of whether 'Dude' or 'Escapade' are obscene according to our criminal law.

"Community standards must be local. In other words, they must be Canadian. In applying the definition in the Criminal Code, we must determine what is obscene by Canadian standards, regardless of attitudes which may prevail elsewhere, be they more liberal or less so.

"I think I should add my view that in cases close to the border line, tolerance is to be preferred to proscription. To strike at a publication which is not clearly obscene may have repercussions and implications beyond what is immediately visible. To suppress the bad is one thing; to suppress the not so bad, or even the possibly good is quite another. Unless it is confined to clear cases, suppression may tend to inhibit those creative impulses and endeavours which ought to be encouraged in a free society."

Again, parenthetically, I pause to note that in the Ontario Court of Appeal in Times Square Cinema Ltd. (1971), 4 C.C.C. (2d) 229, Jessup J.A. held that experts may testify as to the community standard of tolerance in an obscenity case.

In C. Coles Books, involving the novel "Fanny Hill", Porter C.J.O, giving the judgment of the Ontario Court of Appeal, concluded that an "objective" test should be applied to the question of undueness, and on that question the standards of decency and the measure of tolerance in the community must, albeit entailing difficulty, be assessed in relation to the treatment of the subject matter of the book.

Finally, in Prairie Schooner, a judgment of the Manitoba Court of Appeal, Dickson J.A. (as he then was) defined community standards of acceptance, i.e., tolerance. At page 269 of 1 C.C.C. (2d), His Lordship wrote:

> "In the Great West News case we referred to contemporary standards of tolerance. I have no doubt, as Dr. Rich testified . . . a distinction can be made between private taste and standards of tolerance. It can hardly be questioned that many people would find personally offensive, material which they would permit others to read. Parliament, through its legislation on obscenity, could hardly have wished to proscribe as criminal that which was acceptable or tolerable, according to current standards of the Canadian community . . ."

Thus the law is not so much whether the book is acceptable according to community standards, but is it tolerable by those standards in the context of "undueness"? The question is not whether the community will positively accept the book, it is not whether personal standards are affronted by it, but whether a general average of community thinking and belief would entail no objection to the book being seen and read by those members of the community who wished to do so.

Before canvassing the evidence, two submissions -- one by the Defence and one by the Crown -- can be disposed of as pure questions of law.

Mr. Williston contended that the threat by the Crown Attorney to prosecute the accused company unless the book was withdrawn prior to any complaints being received by the police about the book, in itself, constituted a lawful justification or excuse for MacMillan to continue to have it in their possession for the purpose of distribution. This submission does not take into account that the words "without lawful justification or excuse" do not appear in the subsection under which the accused is charged. Those words, which have a precise legal connotation, appear in subsection (2) of s. 159 and not in subsection (1), where the sole issues are obscenity and public good; and the phrase "without legal justification or excuse" is wholly irrelevant to this case.

The Crown submitted that sections 157 and 158 of the Criminal Code were Parliament's yardstick of community standards in the assessment of the word "undue" for the purposes of s. 159. The Crown contended that some of the photographs in "Show Me" were tantamount to the reproduction of acts of gross indecency pursuant to s. 157, in that, if committed by husband and wife, they were not committed in private, by reason of the presence of the photographer; and if committed by unmarried persons under 21, consent would be immaterial, by reason of s. 158.

At this stage of the judgment it is unnecessary for me to decide whether some, if any, of the photographs constitute reproductions of acts of gross indecency. It has been held by the Supreme Court of Canada in the case of Johnson (1973), 23 C.R.N.S. 273, that dancing in the nude in a theatrical performance is not thereby "immoral" for the purposes of s. 163(1) of the Criminal Code merely because nudity under certain circumstances is an offence

under s. 170. Sections 163 and 170 are contained in Part IV of the Criminal Code, which also includes, e.g., s. 171, involving loitering in a public place. In the Johnson case Ritchie J. said, at page 278:

> "This suggestion that an act becomes 'immoral' because it has been made an offence by the Parliament of Canada is to me a completely novel one. It would mean, e.g., that it is a 'breach of moral standards in Canada' to 'loiter in a public place and in any way obstruct persons who are there', contrary to s. 171(c), a section which, like s. 170, appears under the general heading of 'Disorderly Conduct'. For my part this reasoning does not assist me in determining what Parliament intended by the use of the word 'immoral' under s. 163(2)."

For the same reasons I would hold that merely because an act depicted in a photograph may constitute in the circumstances an act of gross indecency under Part IV of the Criminal Code, it is not thereby rendered ipso facto obscene pursuant to s. 159, found in the same Part. The fact that such acts may constitute an offence under other sections of the Code may well be relevant and cogent in the determination of the question of obscenity, but it does not follow that they are per se obscene. Obscenity is defined in s. 159(8) of the Code; and had Parliament intended that obscenity was to be equated to a depiction or narration of sexual offences proscribed by the Criminal Code, it could easily have said no in the subsection itself.

I consider next the evidence called by the Crown in this case.

Dr. Jerry Cooper, a forensic psychiatrist who has had experience in community psychiatry involving mental health problems, was the first witness. Dr. Cooper, the father of four children, analyzed the book against

the SIECUS (Sex Information and Education Council of the United States) guidelines, to be found in a book entitled "Comprehensive Textbook of Psychiatry," 2d edition, edited by Freedman, Kaplan and Sadock.

Against that background, Dr. Cooper found that the book fell far short of fulfilling the guidelines. He testified that the photographs of the enlarged penis and the sexual intercourse close-ups would be frightening to a young girl and exploited sex, and that the captions and one of the photos (particularly that of anal discovery) had elements of voyeurism and invited children to watch their parents' sexual activity. He expressed the view that the suggestion of what to do if children entered the bedroom during parental sexual intercourse constituted emotional blackmail and could only be followed by sophisticated parents and children. Dr. Cooper drew an "erotic" inference from the fact that there were 69 photographs in the book. He considered that the pregnancy and childbirth photographs would frighten children considerably, and that a photograph showing a moment prior to penetration or immediately after withdrawal would cause anxiety in children.

Dr. Cooper felt many of the captions were "stupid" and "confusing"; that the book itself was difficult to understand, unclear, confusing, its purpose problematic. He was of the view that the book failed to take into account the feelings of other people or the intellectual and emotional aspects of love, and that it encouraged family sex games with implications of incest and "sub-incest". One of his principal attacks on the book was his view that it totally lacked guidelines for its use and hence there was a potential for damage. He felt the book's attitude towards elderly people was a pejorative one; and in cases where fathers are playing with their daughters naked, he queried where gratification began and innocence ended.

He testified that another form of emotional blackmail manifested itself in the book in that its thrust was that society is sick if it tries to suppress taboos. The book also preached a false gospel, in Dr. Cooper's view, in that it characterized the beautiful (that is to say, the children) as good and the ugly (that is to say, the elderly people) as bad.

He faulted the book as it made no mention of the postponement of gratification. He felt that it exploited sex education and the public and perhaps the models, who ordinarily would have been paid for posing. Dr. Cooper said the book had elements of pedophilia and that it would stimulate fantasies. He was of the view that only 2% of Canadian parents have sufficient acumen and sophistication to use this book with their children. He equated the sexual intercourse, fellatio and cunnilingus scenes as pornographic, warranting being banned in relation to children.

Paraphrasing Dr. Cooper's evidence somewhat, he capsulated his testimony as follows: Taking the book as a whole, the photography is good; very little educational merit; an exploitation of sex; sensationalism. It is experimental and avant-garde. Although it moves from a repressive society, it is too far ahead of its time. The public are exploited as the author's credentials lend an aura of respectability to it. Its potential for harm outweighs any potential good. Experimentation is dangerous, leading to all sorts of unknown consequences. Children should not be the subject of experimentation. The book is on a par with pornography and constitutes an undue exploitation of sex.

Dr. Cooper conceded the legitimacy of genitalia depiction where a book is designed as a tool for sexual orientation or education, but he testified that "Show Me" would not assist in averting the sort of problems which bring people to psychiatrists.

Dr. John Fotheringham, a specialist in child psychiatry and the father of four children, testified. He detected no nexus between the text, which he described as good, and the photographs, resulting in difficulty in presenting the book to people, as the photographs need explanation (in his view). He felt that the captions were devoid of information, nor did the photographs transmit useful information. He concurred with Dr. Cooper as to the book's derogatory attitude towards older people; the promotion of intra-family sex; the lack of guidelines; the emotional blackmail; the book's limited value as only exceptionally well-adjusted parents could use it; the frightening aspects of the oversized male genitalia; the anxiety developing out of the childbirth scenes; the failure to advocate postponement of gratification, and the blurred division between education and gratification which the book might entail in parents and children who were less than exceptionally well adjusted.

Dr. Fotheringham felt that the book fostered four attitudes: (1) that nudity in the family is good; (2) that sexual intercourse need not necessarily take place in private; (3) that it is important for children to view sexual activity; and (4) that parents' handling their children in the nude is good.

In Dr. Fotheringham's view, masturbation is encouraged in the book, and it ought not to be because it might put children off sexual intercourse in later years. He finds that the emphasis is on physical love and not feeling, regard and respect; that the book negates privacy. Although he could not definitely say it would cause harm, he recommended against the use of the book and felt that some of its attitudes and photographs were contrary to contemporary Canadian community standards.

This witness took the position that many of the conflicts besetting people in the sexual context might be resolved by the use of "Show Me", but its use might

give rise to other equally serious conflicts, such as those arising out of intra-family sex.

Although he would not ban any book, he felt "Show Me" should be restricted in terms of place of availability, and he expressed concern at children having the book in the absence of their parents. Describing the authors as slick and superficial, his major concern was with the quality of the book as an educational tool.

Dr. Marshall McLuhan -- internationally known teacher, philosopher and scholar of media and communications, and father of six children -- looked at the book carefully but said he did not read it in detail. He found that it abstracted sex from social life, and hence it was extremely fragmented and specialized. Its message, he said, was "Kicks for all and all for kicks", camouflaged by a do-gooder attitude; the "kicks" were encouraged by the captions. Defining pornography as the divorce of sex from all other aspects of human living and as the specialized selection of one part of the body without regard for its totality, Dr. McLuhan branded "Show Me" as pornographic. He testified that the text ought to have been replaced by a sound track with yelps, grunts and screams to accompany the photographs.

"Show Me", he asserted, is inconsistent with the survival of private identity and as such is reminiscent of the philosophy of Nazi Germany. He summarized his evidence on this aspect of the book with the aphorism "Everybody is a nobody at the ball park".

By reason of his training, Dr. McLuhan said that he could pass judgment on the book without reading the text completely.

Father Drake Will, a priest of the Roman Catholic Church and director of CCRE, whose background eminently qualified him to testify, gave evidence that the book does very badly what it sets out to do, and that it is not for children. He ascribed to it the epithet "organ recital" rather than a teaching of family values. In his

view, the book advocates pleasure in the sense of titillation as the only value, wholly severed from the framework of the family and without any emphasis on responsibility.

William Deane is the administrative assistant to the Department of Student Services in the Borough of North York, the father of two children, a physical education teacher who has taught a course on sexual education. In the Borough, he pointed out that "family life" courses are taught only incidentally at elementary levels, such as answering questions that children may have about guppies and hamsters. At 16, however, a formal course approved by the Minister of Education is given, emphasizing the family value aspects of sex education. And I received the impression from Mr. Deane that teachers are of the view that parents largely ignore the sexual education of their children.

"Show Me" is neither approved for use in Ontario schools nor used as a reference tool in the Borough. Mr. Deane expressed grave doubts as to whether the latter would ever come to pass. He found the book difficult to use, both as parent and teacher, and he felt there would be a public outcry from parents if the book was used in the schools. Particularly at the lower levels, he felt it would not be accepted by the parent population of their schools. He attributed this to the repressive and sex negative attitudes in Canadian society, where people feel guilty, he testified, about going downtown for a good dinner. He said that the "anything goes" standard of "Show Me" wouldn't wash with people harboring such attitudes, and he would be worried about the reaction of the multi-ethnic cultures.

He could not accept the photographs in the book, although he conceded the author's sincerity and the acceptability of her message.

He believed that some teachers might be able to use the book effectively in the classroom, while others could not. The children, he suggested, were unconsciously

exploited in the photographs, and he complained that not only were perfect people portrayed, but the book was directed to a W.A.S.P. society, omitting black and oriental people. Mr. Deane described the captions as non-sequiturs, incongruous, confusing and in poor taste. Asserting that parents, not teachers, ought to shoulder the responsibility for sex education, Mr. Deane ascribed to the community the right to set the parameters thereof.

This witness would not ban "Show Me", but he would restrict it in terms of place and person. He would also have no objections to parents using "Show Me" with their children if those parents thought it was right.

Dr. John Armstrong is married with four children, a psychiatrist, director of Community Services and well-known for his expertise and experience in the field of alcohol addiction. Generally he opposes the banning of books. As a practitioner, he pointed out that sex interests and problems come into all of a psychiatrist's case work. He found it difficult to appreciate "Show Me" as a good book towards achieving a general understanding of sexual matters, particularly by younger children. The book is technically well done, he said, but the message is not to his liking, as in his view it presents and extols a very liberal type of sex activity to be taught to children at an early age. He disliked the "you're backward if you don't agree with us" theme. He deplored the book's failure to articulate when a child can bring a responsible involvement to sex activity.

The text is good, but unrelated to the photos, and the book is entertainment rather than education. Its main thrust is the enjoyment of physical sex -- although not to the complete exclusion of other aspects of human sexuality, nevertheless sufficiently so to render the book not completely helpful to children.

Some children, he testified, might be frightened by the oversized penis.

He synopsized his views as follows (and again I paraphrase): "Speaking impressionistically and speculatively, the problem is the children's inability to distinguish what is an appropriate stage of readiness to assimilate the material -- and some parents might even involve the child in some form of sexual activity that the child is not ready for." Dr. Armstrong would not recommend the book nor did he believe that his parent-patients, who he thought were representative of a cross-section of the community, would want to use it. He paralleled Dr. Potheringham's testimony in giving evidence to the effect that even though in some instances if patients had had sexual education sexual neurosis might be avoided, nevertheless the new sexual freedom has resulted in different types of sexual "hang-ups".

Dr. Armstrong felt that some parents could use the book wisely and others could not.

Lorraine Deane, the wife of witness William Deane, was a trustee of the North York School Board for eight years, and she testified as to the problems encountered by people sponsoring a course in the Borough on sex education entitled "family living". Indeed, she pointed out, sex education is a touchy, delicate and opinion-splitting issue in the parent school population. Mrs. Deane thought "Show Me" was unresponsive towards helping people. She classified it as stark, and the photographs "scared" her. It was not a book to educate children, and it did not meet community standards.

I turn now to the evidence of the Defence.

Thomas McCormack is the President of St. Martin's Press in New York, the publishers of the book. He is married, with an eight-year-old son. True it is that he might have some interest in the outcome of this case; nevertheless it is manifest that he was a well-educated, intelligent and thoughtful person.

"Show Me" was not published for money and is the only sexually explicit book the publisher could find.

Prior to accepting a book for publication, St. Martin's asks whether the book does something "worthy". Mr. McCormack was skeptical about "Show Me" initially and took time to adjust. He ascribed his initial skepticism to his lack of exposure to sex studies as a child. He testified that the author (Dr. Fleischhauer-Hardt) had all the credentials of a reliable authority, and he understood her thesis to be that a child should be completely exposed to sex from as early an age as possible, that there was value in a frank exposé and there was no valid reason why anything should be held back.

The book has been prosecuted and not convicted in one form or another in Massachusetts, New Hampshire and Oklahoma, although the approach in the State Courts varies significantly from the legal position in Canada.

"Show Me" is recommended by the American Library Association.

In her refusal to inhibit sex as being "evil" and "wrong", the author's intentions are sincere, he said. There is no other available material for children in which sex is treated as an everyday natural thing. Mr. McCormack today espouses the view that children should consider sex to be as normal and natural as television's suppertime production "Star Trek".

Classifying the book as one of sexual orientation, attitude-forming rather than primarily informational, Mr. McCormack thought it would do a lot of good and that its disadvantages were outweighed by its advantages.

Reverend Brooks is a United Church minister, with a family, who has been extensively involved in marital counselling, 90% of which has involved sexual problems. He also has counselled fellow ministers in that regard. Teen-aged counselling was also within his scope of experience.

The author's purpose, he said, was to present a book for parents to use with their children to acquaint

them with the functions of their sex organs and the relationship established out of sexual contact. The book successfully does that. Sexuality is treated directly and honestly, and not immorally. The photographs are not erotic but assist in eliciting questions about sex. Reverend Brooks would recommend the book, as he believed the average Canadian parent could use the book for the author's stated purpose. He felt it was neither offensive nor harmful to the community, promoting neither promiscuity nor permissiveness; the captions constituted a running story with a unifying thread, and the public good was served by the book, in his view. He disfavoured any form of censorship, and he has used the book with his two younger children and has discovered no invasion of privacy. Although he would delete some of the photographs, it would not concern him if the book fell into the hands of children without parental guidance.

Rabbi Gunther Plaut has been associated with Holy Blossom Temple in Toronto for 15 years. Trained in the law, he is now an eminent theologian who relates with other faiths. Rabbi Plaut was not offended by "Show Me", which he felt was novel in its use of photographs. The book, he said, tries to register authentic emotions of children and would be useful if used by careful, concerned parents. Unless a page is taken out of context, no question of base or improper purpose arises. The book as a whole tries to fill a need, and the public good is served, he said. Rabbi Plaut considered the book acceptable to a great majority of Canadians, although clearly some groups would object to it. He opposes censorship generally.

The book, he said in cross-examination, shows reverence for the family, other human beings and the reproductive process. No disrespect for older people was demonstrated, but rather the book manifested the desire of children to identify with their elders, such as their mother and father. He thought the book fitted in

with the best traditions of what the community is trying to do with sex education. On the issue whether the models have been exploited, Dr. Plaut would not wish to interfere with the judgment of parents permitting their children to pose.

Dr. Robert Pos is Professor of Psychiatry at the University of Toronto and Chief of Psychiatry at the Toronto General Hospital. His credentials and his achievements are impressive. As a result of reading the book for 25 hours over a period of two weeks, he felt it was the most influential book on sex published in the last 100 years and that there were no psychiatric reasons why it shouldn't be published.

In his professional judgment, the three great molders of sexual attitudes were Professor Krafft-Ebing (author of "Psychopathia Sexualis" in 1886), Sigmund Freud and Kinsey. I am quite satisfied that in Canada, even if Krafft-Ebing's book is available, it is little read, and that the works of Sigmund Freud have diminished considerably in influence. Therefore I do not intend to canvass Dr. Pos' evidence of the essentials of Krafft-Ebing's and Freud's thinking. He said that Kinsey's books "Sexuality in the Human Male" (published in 1948) and "Sexuality in the Human Female" (published in 1963), descriptive of sexual practises in the United States, caused an impact on and a re-thinking by people who read of the universality of sex play amongst children, a conclusion reached by Kinsey as a result of 18,500 interviews.

Dr. Pos prefaced his exposition of what he believed to be the current view towards sexuality with the observation that psychiatrists tend to view society through their clinical experience, which is primarily with sick people. His evidence was that the view today is that sexuality is pleasurable and non-injurious to a consenting partner, if not promiscuous. It is now

recreational, not procreational, and it involves moral and religious values.

Sexuality, he testified, peaks in youth, at a certain period when the role of parents becomes very important. That role is to see that natural impulses are molded in a matrix of what is acceptable to the community. The role involves the development of morality. Children must receive truthful and not false or spurious information. "Show Me", in his view, intended as it is for parents and children and the average reader, is appropriate within the context of current sexual attitudes and the role of the parents. The parents must read it first, as they must get in touch with sexual reality. They will find that the book emphasizes the fact of sexuality and the importance of parents as sexual educators, in his opinion.

In "Show Me", people come across healthy and strong, and health will not lead to the form of psychosis associated, e.g., with the movie "The Exorcist".

Dr. Pos testified that the sexual education of a child should start at age three, and sex play between five and eleven. He thought that menstruation should be explained to a girl before she went to school and a "wet dream" to a boy before he had one.

The child will be comfortable with the book if his parents are; and in Dr. Pos' view most parents can use the book. As long as the parents present an explanation, the disproportionate organs can be dealt with realistically by the child. Dr. Pos equated the childbirth scenes to the Crucifixion, in terms of the happiness depicted, rather than the pain. He thought there was no harm in confining the book to beautiful people, as beauty is the medium by which the message gets across -- since if beautiful people act in this way, such actions will be considered normative.

Nudism generally (e.g., at the breakfast table) was not encouraged by the book. Nudism per se does not titillate, Dr. Pos giving as examples Japanese men and

women bathing together and European women breast-feeding their babies in church.

As incest is a universal taboo, "Show Me" will not lead thereto. Nor does the book advocate anti-privacy for adults engaging in sexual intercourse. Neither will using it lead to indiscriminate sexual relations in or among the family. Such use will, however, increase the tolerance of parents to observe sexual play amongst siblings. The book does not promote promiscuity, nor is such carnality inherently a potential as a result of the book's use. Contrariwise, the emphasis is on a healthy family with concomitant tenderness and regard for feelings.

The book is no protagonist for voyeurism, defined by Dr. Pos as "getting kicks from watching the facial expressions of people during sexual activity", and the captions do not indicate to Dr. Pos that the commentators are watching sex play.

Pedophiliacs would not be interested in the book. Dr. Pos conceded that the book does contain elements of "emotional blackmail"; but he added that, in his view, so do most of the world's greatest religions, giving certain specific examples. He says that we resent the "emotional blackmail" because of our Victorian upbringing.

Dr. Pos testified that there was no portrayal of disrespect for older people; that the parent need only explain to the child that "grandpa" looks upset because he cherishes different values than the explainors.

The photographs are most useful in acquainting the parent with sexual realities because of their graphic quality. There is no impropriety in the lack of step-by-step relationship of the written text to the photographs, since the photographs enable the child reader to acquire an awareness of what the other sex looks like. Fellatio is acceptable, and in any event 32 of the photographs do not pertain to sexuality, and the book is definitely not concerned solely with physical love.

According to Dr. Pos, the author (Dr. Helga Fleischhauer-Hardt) has had considerable experience in dealing with parents and young children, and the book was written on the basis of that experience. The conclusions in the book are substantiated by clinical research.

The Afterword at page 171, to which I have already made reference, is illustrative of a worthwhile purpose, according to Dr. Pos. It may or may not be that Canadian society is prepared to accept the book. Generally, Dr. Pos opposed censorship. Although he queried the ethics of experimenting with this book on children, he had no doubts of the ethics if the parents had given permission to have their children photographed.

With the book Dr. Pos would hope for an attitudinal change to what is normative in behaviour. He testified that the book might be a contribution to this.

Dr. James Whan is involved in family medicine and full time psychotherapy where sexual problems are involved. He is married, with four children. He testified that the book is designed primarily to assist adults in teaching their children about sex. The book's message is that sex is pleasurable and healthy and not to be looked upon with fear, guilt or shame. The photographs, which are neither harmful nor provocative, are indicative of how children learn.

Dr. Whan's evidence was that the public good was served by the publication of the book, and he based this opinion upon 12 years of clinical experience. He has seen many people who have illnesses such as ulcers, and such people react to stress as a result of problems with their spouses. He says there is a great need for more enlightened knowledge about sexual matters. People are ignorant of their bodies, and this leads to shame and guilt feelings. Such people are unaware of their sexual needs and they are unable to communicate their needs to other people. He felt the book is a step to liberate

people from their own guilt sensations and repressed needs. He said that people require sex and can't fulfill their requirements, shutting such need off early in life with resultant psychosomatic illness.

Mrs. Ann Barrett, who has two daughters, is the executive secretary of SIECCAN, the co-author of a sex education course for Grade 6 students in the Borough of North York, and was formerly a high-school teacher.

She found "Show Me" to be warm, open and unique from the standpoint of the use of photographs. She attributed to Dr. Fleischhauer-Hardt an objective of showing the naturalness of the human body, and the recognition of the natural curiosity of children in respect of their own bodies and the bodies of others, with regard to breast sizes, penises, circumcision and the like. "Show Me", she testified, provides an opportunity to get at "feelings" when parent and child peruse the book together.

She said that all Grade 6ers possess this curiosity. They want to know how it happens -- "Where do the arms and legs go?" "How do I get my penis in?" She said that children are reluctant, and parents ought to say, "It's O.K., I was like you too."

"Show Me", she said, helps people to sort out their feelings and attitudes and provides an opportunity for the parent to discuss the range of sexual conduct (e.g., fellatio) with their children. In Mrs. Barrett's view, it is much easier for a six-year-old to become acquainted with the range of "how it is" than a 25-year-old.

The witness uses the book in adult courses, and her pupils are at ease with it. She knows of no other so satisfactory reference book.

Dr. Elizabeth Brodie is a psychiatrist, specializing in psychotherapy mostly with people wishing to achieve a better degree of adjustment in occupational and sexual relations.

The book is directed, in her view, both towards parents in their own right -- namely, their own thinking about sexuality when they themselves were children -- and to their children in terms of sexual education in conjunction with their parents.

Innovative and daring in the manner in which the material is presented, the author treats the family with the utmost respect, in the view of Dr. Brodie. She discovered several references in the text treating the family as a unit and containing expressions of love and warmth. Sex is not dealt with as a separate entity, the text dealing with moral values and the whole conveying a sense of responsibility in the area of sexuality and morality.

The book is not harmful but healthy, serving the public good, as otherwise she fears that parents will transmit their own inhibitions to their children. Dr. Brodie found no element of "emotional blackmail" nor exploitation, as the child models appeared to be "comfortable". If parents disclose a sense of shock upon discovery of parental sexual intercourse by their children, the harm conveyed thereby may be incalculable, in her view.

Dr. Beryl Chernick and her husband, practising in London, Ontario, are well known for their work in mental health and the sexual region. They have three children. She was pleased with "Show Me", which reflected a quality of "caring" and an interaction between parents and children. She felt that this kind of material might avert tragedy. She shared the viewpoint of other witnesses that the adults must assess their own attitudes towards sexuality, obtain adequate information, become at ease with the book and use it with their children. The Chernicks have given extensive presentations in many parts of Canada and elsewhere, according to Dr. Chernick; and she said that at each of them, adults tell her that they hope their children will be more comfortable in sexual matters than they are.

The book serves the public good as it is a useful resource and one of the few available. The witness believed that some community standards would be violated by the book but that others would welcome it. It is true that the former group would consider parts of the book erotic; however, "Show Me", she said, is not a "how to" book. The photos simply tell it as it is. If masturbation is not discussed, for example, boys and girls receive the impression that it is wrong.

Finally, she felt that there was no exploitation of children in "Show Me".

Dr. John Lamont is an obstetrician engaged in sexual education and counselling. His clinical experience reveals that many of his patients have had traumatic experiences in childhood. "Show Me" presents the question of childhood and adolescent sexuality openly and comfortably. It candidly states the idea that sex is fun and is supportive of the married relationship. It lays emphasis on a healthy body, stressing the married relationship, love, trust and affection in terms of the sexual relationship.

The attitude of the book towards older people is wrong, according to Dr. Lamont.

The purpose of the book, in his view, is twofold: first, to state that adolescence involves sexual beings; and secondly, to be a great help to parents in teaching their children about sex. It is also a great help to professionals for educating parents in the manner in which they can broach the topic with their children.

"Show Me" serves the public good, and in toto does not offend contemporary Canadian community standards, even though it might shock some people. Notwithstanding its support of the family concept, the book seems to promote extra-family sexual relationships. The photographs, however, did not exploit the children's privacy, they having consented.

The final witness was a physician, Dr. Saul Levine, who is the father of three children, with one of whom (aged nine) he has used the book, which he characterized as neither prurient, erotic, corrupting nor dangerous to children. The purpose is underlined by idealism, without exploitation. If parents are "comfortable" with the book, they can use it in the education of their children -- and clearly some parents will not be able to do so.

"Show Me" serves the public good and is not offensive to contemporary Canadian community standards. Dr. Levine is basically opposed to censorship.

* * * * *

I must consider now whether "Show Me" is obscene within the meaning of the Criminal Code, and if so, whether it serves the public good or whether it goes beyond what serves the public good.

I approach this decision not only in the light of the law as set forth earlier in these reasons but also against the background of certain important, vital considerations. Freedom of expression is a hallmark of a free society. Curtail and erode such freedom, and liberty withers away. Censorship is an attribute upon which totalitarianism in all its forms flourishes. However, there cannot be unbridled freedom of expression. As Mr. Justice Holmes observed, freedom of expression does not embrace a false cry of "fire" in a crowded theatre, nor does it include (as a witness here related) a statement in Central Park in wartime to the effect that a troop ship is departing at 11:00 p.m. And it is stating the obvious that freedom of expression is limited by the law itself, and sanctions directed against sedition, slander, obscenity and the like.

A free society depends for its vitality on a moral foundation. No such society can exist or continue to exist, absent the presence and preservation of a

strong moral fibre. This in part is fostered by Parliamentary proscription. I have no doubt that you cannot legislate morality, but it is a legitimate exercise of responsible government to deter corruption and create a climate in which healthy attitudes are nourished and encouraged within the community. Sexual morality in children and their attitudes in this regard form an important part of the total spectrum of moral integrity.

I have analyzed the evidence and I have given the case the best consideration I can. And approaching the matter objectively, which is what the law requires me to do, I cannot say that the Crown has satisfied me beyond a reasonable doubt that the book "Show Me" is obscene -- i.e., that a dominant characteristic of the book, taken as a whole, is the undue exploitation of sex.

Mr. Lewis, in his able submissions, contended that it is open to the Court to find that the book is a fraud, the text merely camouflaging the photographs, and the purpose of the authors not as they state it to be. Mr. Lewis submits that the reference to 69 photographs, the fellatio, the anal insertion and masturbation scenes all smack of the leer of the sensualist, and that the authors have exploited the models in the book; hence their motives are suspect.

I am far from satisfied that the authors' purpose was merely base exploitation, but rather the evidence and my own assessment of the book lead me to conclude that the purpose of the book was a serious one. I think its purpose, which I gleaned from the Afterword (which, I might say, would have been much more appropriate as a Foreword and ought to have preceded the photographs), from the book itself and from the evidence, was to provide a book to be used by children with their parents, designed to educate, orient and acquaint children and parents with the realities and actualities of sexuality, their own and of the opposite sex.

Dr. Fleischhauer-Hardt seems to me to be qualified to co-author a book which has such a purpose. Her qualifications and background, which have not been challenged, appear on the dust jacket. She was born in 1936 in the German Rhineland, studied medicine in Freiburg, Tübingen and Munich. From 1962 to 1964 she practised at the regional psychiatric hospital in the Swiss canton of St. Gallen, and from 1963 to 1966 studied at the Psychoanalytic Institute in Zurich. Since 1969 Dr. Fleischhauer-Hardt has served as teacher and advisor at the School for Parent Education in Reinach, Basel, of which she was made president in 1974. In 1973-74 she served as president of the Educational Advisory Board of Reinach. During her years as child therapist and parental advisor she realized that most parents had little knowledge of the sexual behaviour and development of children, and that modern publications were doing little to fill the void. Dr. Fleischhauer-Hardt is the author of numerous articles on psychohygiene in children and co-author of "Sexual Education in School". She is married and the mother of three children. So states the dust jacket.

I do not draw any sinister inference from the fact that there are 69 double-page photographs and that that fact is announced on the dust jacket. I am entitled, I think, to recognize that the word "sixty-nine" has an explicit sexual meaning where English, French and German are spoken, and that the figures "69" are written identically in each language. In the German edition of the book there were 70 photographs; the American publishers decided to delete one. Accordingly, so far as the authors are concerned, the reference to "69" is not attributable to them and in my view is purely fortuitous.

I have no doubt that the fellatio, the oral insertion and the masturbation -- and, I would add, the cunnilingus scene -- if considered in isolation from the rest of the book and divorced from the purpose and object

of the book, would constitute obscene reproductions. I will discuss this in more detail momentarily.

Did the authors exploit the models used? Were the authors callous to the rights and dignity of the children, thereby resulting in doubt being cast upon their sincerity of purpose? On balance, I do not think so. A great deal of the evidence was directed to this point. I was impressed with the evidence of Dr. Plaut, who said that he would not wish to interfere with the judgment of parents permitting their children to pose. Nor is there any evidence contradicting Mr. McBride's note at the end of the book indicating that except for the coitus scenes, mothers and fathers of the children were present and helpful during the photographic sessions.

I would hesitate to say that children's rights and dignity were exploited when their parents agreed to and were present at the photographing.

I agree with Mr. Lewis that the fact that a book has a serious import will not in law preclude a finding of obscenity. (See, e.g., Duthie Books, [1967] 1 C.C.C. 254, a judgment of the British Columbia Court of Appeal, dealing with the novel "Last Exit to Brooklyn".) Mr. Lewis takes the view that the book went farther than its internal necessities, considered in the context of its objectives, required. In this regard, Mr. Lewis says a "base" -- and I quote that word -- a "base purpose" can be found in the attempt of the authors to destroy the essential privacy of human sexuality and lay it open for the world to see. Mr. Lewis submitted most vigorously that the book constitutes a massive assault on privacy.

I confess to some difficulty in grasping the idea that anti-privacy is synonymous with obscenity, although I concur that privacy in sexual matters is grossly and gravely affected by the book. I propose to deal with this from two standpoints: (1) the invasion of the privacy of the models themselves by the presence of

the photographer and parents, and (2) the position of the book regarding children entering the parents' bedroom when the latter are engaging in sexual activity.

True it is that the essential privacy of human sexuality is totally destroyed by the book so far as the models are concerned; but it was done either with the consent of the models themselves or, in the case of the children, with the consent of their parents. The "invasion" of privacy connotes an unwarranted, unjustifiable interference with privacy, which can hardly be the case where privacy is waived.

Nor do I read the book as advocating anti-privacy in the realm of adult parent sexual relations. The excerpt from page 157 which I have previously set out, while discouraging the locked bedroom door approach, clearly contemplates that sexual relations will cease, regardless of the degree of liberation and toleration that the parents have attained in matters of sexuality.

Accordingly, although there has been an erosion of the privacy of the models, I am unable to say that there has been an assault on or an invasion of their privacy, nor do I think that the book advocates anti-privacy. In any event, as I have said, I have difficulty understanding how obscenity and anti-privacy are synonymous.

I turn now to a further consideration of the submission of Mr. Lewis that the book may be nonetheless obscene notwithstanding the serious purpose of the author, and discuss the submission in the context of the subject matter and the internal necessities of the book itself.

That a dominant characteristic, truly <u>the</u> dominant characteristic of "Show Me" is the exploitation of sex is indisputable. That's what the book is all about. The law of obscenity, however, assumes that there will be an exploitation of sex to some extent. The question is: is the exploitation "undue"? And whether or

not the exploitation is "undue" is to be tested against the internal necessities of the book itself.

The book is concerned with the sexual education of children, and the authors' approach is that the subject ought to be broached as soon as possible with a child and should be concerned with the realities of sexuality. No doubt the book is avant-garde and novel in its approach, but surely that alone cannot condemn it.

Mere nudity, nakedness, in itself has never in recent years been considered obscene. The human body is regarded by most people as beautiful, and beauty and obscenity are anathema the one to the other. In a work designed for sexual education and orientation, the legitimacy of genital depiction can hardly be gainsaid; indeed, Dr. Cooper conceded it.

I think that some of the sexual activity depicted in the book could have been omitted without consequent impairment of the internal necessities of the book itself, but its inclusion does not convince me that the book is obscene; and I find it incomprehensible to conceive of a picture book about sex in the purview of the authors' aims which would not deal with sexual intercourse, masturbation and bodily exploration.

I believe that the photographs showing fellatio and cunnilingus could well have been left out of the book. Regard being had, however, to the fact that such sexual conduct in fact occurs and that Parliament here has destigmatized such conduct from criminality under certain conditions, as provided for in s. 158 of the Criminal Code, I am unable to say with certainty that the depiction of such acts was wholly unwarranted, in terms of the internal necessities of the book.

The photograph of anal discovery and exploration, taken by itself and out of context, would in my view be obscene; but regard being had to the evidence that children do explore their bodies and the overall purpose

of the book, again I cannot say with certainty that its inclusion was not required by the internal necessities of the book, nor would I brand a book obscene on the basis of one photograph.

Much was made of the photographs showing over-sized genitalia, close-ups of sexual intercourse, and childbirth and its associated pain. Some of the Crown witnesses testified that this would instill fear and anxiety in young girls. Again, I admit to some difficulty in seeing any nexus between this facet of the book and the issue of obscenity. Merely enlarging something which if not enlarged is not obscene, or taking a close-up of something which otherwise is not obscene, in all of the circumstances cannot in my view make it obscene; and I have already dealt with the issue of the depiction of genitalia and sexual intercourse. If the photographs of the enlarged genitalia could inspire fear and anxiety in some young girls, I am satisfied (as was Dr. Fos) that parents using the book with their children can adequately cope with the situation, a matter to which I will shortly return.

I have even more difficulty in ascertaining any link between the potential fear resultant upon looking at the childbirth scenes, with the attendant pain, and the issue of obscenity. There is no suggestion and there cannot be any suggestion that the childbirth scenes constitute an "undue" exploitation of sex. I am unable to follow how fear or anxiety (if fear and anxiety there would be) in a young girl arising out of looking at the pain on a mother's face during delivery, can have any bearing whatsoever on the issue of obscenity. In any event, pain is an inevitable actuality of childbirth, the prospect of which must be taught in any good dealing with all aspects of sexual education. Undoubtedly a parent discussing the pain connected with childbirth with her daughter would emphasize the sheer joy and profound happi-

ness attendant upon childbirth, thus minimizing but not avoiding the element of pain.

Another feature of the book much canvassed in the evidence was whether it deprecated and was disrespectful of older people, and whether its attitude towards people whose ideas did not accord with the authors constituted a form of "emotional blackmail".

It is obvious that the book disparages older people who oppose the book's approach and message, by characterizing them as "narrow-minded, repressive and inflexible"; and it is no credit whatsoever to the authors that they saw fit so to do. The book, unless parents are very careful in this regard, may very well encourage children to disrespect older people and foster in them attitudes wholly inconsistent with the arguments that the Defence has presented to me in this trial -- namely, tolerance and understanding of the attitudes and beliefs of every citizen in the community.

The same may be said about the authors' attitudes towards parents who will not permit their children to play sex games. At page 156 such parents are variously described as "prudish", having "sexually repressive attitudes" and requiring a "more tolerant attitude". The arbitrary approach of the authors is hardly conducive to the development in children of a trait of respect for the opinions, views and beliefs of other people.

However much we may deplore this feature of the book, its shortcomings in this regard can have no relevancy to the issue of obscenity. Regrettable as the attitude may be in terms of the development of a child's total character and personality, it does not make the exploitation of sex in the book "undue".

I propose to deal with other matters arising out of the evidence before considering "undueness" in the light of contemporary Canadian community standards.

Culled from the evidence of some of the Crown witnesses are opinions that the book promotes family sex

games, incest, masturbation (both in isolation and with a sex partner), premarital sexual intercourse, pubertal promiscuity, pedophilia, extra-family sex relationships and voyeurism. In the same vein were opinions that the book stressed physical sex without any adequate emphasis on the elements of family, responsibility, feelings and regard. The book did not mention postponement of gratification, which of course is an obvious social requirement.

Were these charges true or substantially true, no doubt the exploitation of sex would be "undue" and the result of this case different, unless a defence of public good could be established. However, in the light of all of the evidence and my own analysis of the book, I am far from convinced that the attacks made on these grounds are valid.

Sex games involving children are discussed but are only promoted in the sense that since they occur in any event, the parents are advised by the author to be tolerant of such conduct in order that the child's attitude towards his or her own sexuality and that of others may be positive. The book clearly neither advocates nor depicts sex games involving parents and children.

In relation to the book promoting incest and sub-incest (to use the language of Dr. Cooper), consideration should be given to Drs. Cooper and Fotheringham's point as to the grey line of demarcation between gratification and innocence where father and daughter are photographed playing together. I agree with Dr. Pos that incest is a universal taboo, unlikely to be engaged in by anyone except a very minute segment of the population. I trust the common sense and integrity of Canadians, and I am confident that anyone who read this book would not consider that it promoted or advocated incest or analogous sexual conduct.

I do not understand the book to promote masturbation. In fact, the excerpt from page 170 which

I have set out clearly cannot be so interpreted, and states unequivocally that prolonged masturbation as the sole form of sexual activity will lead to problems of sexual gratification in later years. The book merely recognizes at page 168 that

> "They [the parents] should also talk to the children about masturbation in order to spare them unnecessary feelings of shame and guilt. Masturbation is a normal part of sexual behavior which is practiced in play form from early childhood on. It allows boys and girls to work off their sexual desires and get to know the sexual reactions of their own bodies."

I agree with Mr. Williston that "Show Me" merely recognizes the existence of masturbation, its potential for problems and how to deal with it. I think Dr. Chernick is right when she says the topic must be discussed, otherwise children may well get the idea that the practise is "evil" and "wrong".

In the text, premarital sexual intercourse is discussed and, I apprehend, conveyed by the photography. But does the book encourage or promote it? I think not. Again, it recognizes its occurrence as one of life's realities. The last paragraph of the excerpt I have quoted from page 170 is no endorsement of premarital sexual intercourse, and the same excerpt negates any advocacy or promotion of pubertal promiscuity; and in any event, any indirect promotion of promiscuity or permissiveness can be checked by adequate parental instructions.

Reference should also be made again to the caption at pages 112-114, where the authors make the point that sexual intercourse only occurs when people are older.

Dr. Pos' evidence leaves considerable doubt that pedophiles would be interested in the book.

Dr. Lamont testified that notwithstanding the book's support for the concept of the family, it seemed

to promote extra-family sexual relationships. If by that he meant the recognition of the fact of children's sexual games, no doubt he is correct, in the sense that the authors favour tolerance of a universal phenomenon (as to which see the excerpt from page 156 of the text which I have set out in these reasons). I do not agree with Dr. Lamont if the thrust of his testimony was otherwise, for reasons to be shortly stated.

Dr. Cooper felt that the book promoted voyeurism. It may be that some children viewing the photographs in the absence of their parents might come to the conclusion that it was in the nature of things to observe other people's sexual conduct. Dr. Pos' evidence on this matter does not much assist me. In the final analysis, while I am far from convinced that Dr. Cooper is wrong, I'm not certain that the book promotes, directly or indirectly, voyeurism. I leave it simply on the basis that the book could have these consequences and trust parents to ensure that the problem will be dealt with wisely and intelligently.

The evidence of Drs. Cooper, Fotheringham and Armstrong, Professor McLuhan and Father Drake Will was to the effect that those aspects of feelings, regard, family and responsibility which are intrinsically part of the totality of sexual experience, were severed and ignored by the book, the principal thrust of which was the emphasis on physical love and carnality. I have no doubt of the sincerity of any of those witnesses; but again, I find considerable doubt on that score. The quoted portion of the text at page 170 and the Foreword, but particularly the photographs themselves, do not support, in my judgment, the views of those witnesses. Dr. Plaut, Dr. Pos, Dr. Lamont and Mrs. Barrett were of the view that the book positively stressed those very values which the Crown witnesses felt were wholly ignored or insufficiently emphasized. To my mind, the photographs themselves are the principal evidence of the authors' belief in the

concept of the family and in the totality of sexuality. I do not intend to review the photographs again, but the captions are replete with references to Mother, Father, Brother, Sister and Baby, and adulation of the parents. Sexual conduct in the context of love is the theme; violence and carnality for its own sake are not present, in my view, on an overall reading of the book.

It is true that the book does not promote postponement of gratification, but neither does it encourage instant gratification; and the social necessity of postponement of gratification is an inevitable result of social interaction and parental guidance.

Earlier in these reasons I indicated that if the depiction of some of the sexual acts in the book constituted an offence under sections of the Criminal Code apart from the obscenity section itself (e.g., gross indecency), that fact might well be relevant and cogent on the question of whether the photographs and the book were obscene. I remain of the view that it is not necessary for me to decide whether the photographs, or any of them, contravene ss. 158 and 159 of the Criminal Code specifically, although I have indicated quite clearly my views in relation to certain specifics of the photographs.

Photography is the medium through which the authors have chosen to present their topic. In their view, which I have found to be serious and sincere, photography was the most graphic way to depict the human body and human sexuality. I quote again from the Foreword at page 4:

> "We are of the opinion that only an explicit and realistic presentation of sex can spare children fear and guilt feelings related to sexuality. For this reason we chose photography as a medium."

I cannot find beyond a reasonable doubt that the use of photography, bearing in mind the authors' purposes and objects and the internal necessities of the

book itself, thereby emphasizes sex for any base purpose.

In view of the foregoing, I am unable to conclude that there is any emphasis of the theme of sex education and orientation for any base purpose. To quote the words of Judson J. in Brodie (37 C.R. 120, at 144) -- and this is confirmed by Reverend Brooks and Drs. Whan, Pos and Levine -- the book, as a whole,

> ". . . has none of the characteristics that are often described in judgments dealing with obscenity -- dirt for dirt's sake, the leer of the sensualist, depravity in the mind of an author with an obsession for dirt, pornography, an appeal to a prurient interest, etc."

-- and, measured by the internal necessities of the book itself, there is no "undue" exploitation of sex.

Finally, I turn to contemporary Canadian community standards. Is "Show Me" tolerable by these standards? Would the general average of community thinking and belief entail no objection to the book being seen and read by those members thereof who wished to do so?

As Mr. Justice Freedman said in the Dominion News and Gifts case (supra), grasping a general average of community thinking and feeling is to seek a quantity that is elusive. In order to find such a quantity, regard must be had to the evidence in this case, and to Mr. Justice Freedman's observation that in Canada today the whole question of sex is discussed with relative freedom. Certainly I gather from the witnesses that there is much public discussion of the issue of sexual education in the public and high schools. Movies, television and books which have national exposure clearly deal with sex with a candor and realism which would have been unthinkable not so many years ago.

I have no doubt that there will be people, many of them, who will find "Show Me" shocking and offensive to them personally and who will sincerely hold the view that the book ought not to be used by parents

with children, as it (in their view) pushes children into sex too early, it treats as normative sexual practices they deem indecent and perverted, and it will foster attitudes of the kind I have described in some detail in these reasons.

The book, however, is designed for use by parents and children. Sexual education, in the view of the authors and some of the witnesses, should begin at an early age. Many parents, I am told both by the authors and the witnesses, are unaware of their own total sexuality and view it with feelings of guilt and repression. Parents in such a condition cannot be expected to convey to their children a healthy attitude towards sexual matters. If parents do become informed and aware of their own sexuality, then they are in a position to deal positively and healthily with the fact that their children are sexual beings and to develop their children's sexuality with the help of the book, within the framework of the family, love, responsibility and morality, according to the witnesses.

As I conceive this to be the object of the book, it is my view that the Canadian community today, as understood by Mr. Justice Freedman, would tolerate parents who wished to do so, using the book with their children.

Many of the witnesses were of this mind. I found Dr. Plaut's evidence that the book fitted in with the best traditions of what the community is trying to do with sex education very helpful on this aspect of the case.

If the book were intended to be and was viewed by children without guidance and explanation from their parents, the book would, in my judgment, seriously offend contemporary community standards in this country. That is not the intention of the authors, and I doubt very much that the packaging and pricing of the book would permit it to fall into the hands of children, save through the agency of their parents.

Finally, I discuss whether parents can use

this book with their children as an instrument for sexual orientation and education. Drs. Potheringham and Cooper expressed the view that the book provided no guidelines for its use, and Drs. Potheringham and Armstrong testified that there was no nexus between the text and the pictures. Dr. Cooper was of the view that only 2% of the Canadian parent population could use the book effectively.

The lack of a nexus is, I think, satisfactorily accounted for by Dr. Pos when he says that the photographs enable the child viewer to acquire an awareness of what the other sex looks like; and in my view the text obviously is for parental use. Accordingly, a nexus is not essential.

I am not as pessimistic as Dr. Cooper about the percentage of Canadian parents who could use this book effectively, and I am satisfied that a concerned and wise parent would have no trouble in formulating guidelines for using the book with children. I think that many, many Canadian parents could and would use this book effectively with their children, and I agree with Reverend Brooks, Rabbi Plaut, and Drs. Pos and Levine in their more optimistic view of the ability of the parents of this country to use the book.

In concluding that the community feeling and belief would tolerate the use of the book, I have carefully considered the admonition of Mr. Lewis that community standards in this country are not merely those of the university academic and psychiatric community, and I have endeavoured objectively to ascertain the general average of feeling and belief of Canadians in general, urban and rural, from coast to coast.

I cannot find any "undueness" in the exploitation of sex in "Show Me" considered in the light of contemporary Canadian community standards.

This has been a lengthy judgment, as it is common ground that the matters discussed are of consider-

able importance to the community. I have tried to deal with each matter as it arose from the evidence, whether it was specifically argued by counsel or not. I have not found it necessary to deal with the defence of public good, in view of the finding I have made on the issue of obscenity.

Before leaving the case, I wish to commend counsel for their assistance to me throughout and for the forceful presentation of their respective cases. I wish also to acknowledge the sincerity of each and every witness who testified.

In the result, I find the accused company not guilty.

* * * * *

Certified correct,

Barbara Praino, C.S.R.
Official Court Reporter

Senator SPECTER. There was a regular written opinion in the Toronto case?

Mr. MCCORMACK. Yes.

Senator SPECTER. So there have been the four actions brought against "Show Me"?

Mr. MCCORMACK. Yes.

Senator SPECTER. What specific parts of "Show Me" did the four actions attack?

Mr. MCCORMACK. What they did tend to do, quite regularly, was pick out a picture or two. Indeed, the book is——

Senator SPECTER. Which pictures or two?

Mr. MCCORMACK. Oh, they varied. There is a picture, about a third of the way through the book, with a young woman holding the penis of a young man and just judging from the physique of these people, they look to be under 16, and since this is physical contact between two people, it seemed to them, and it certainly seems to us at this moment, that it is not simply nudity. It is contact and evident activity of some sort. That was one in which they certainly cited.

Then they cited certain solo pictures, especially small ones in the back of the book where a child is touching himself or herself.

Senator SPECTER. When you published the book, did you consider omitting those pictures which might be somewhat more controversial?

Mr. MCCORMACK. Yes; we did consider it. And we made the judgment that this was contrary to the very premise that Fleischhauer-Hardt had when she wrote the book which is to say, look, children do these things. My book is based on the premise that only a totally open and explicit discussion of sex and attitude toward sex is the way to a healthy adulthood in sex.

Her feeling is, in all honesty, that there should be nothing hidden about sex from children. Her experience is that children do not get ready for this book; they get unready for it. A lot of people say children are not ready for this book. No child of 3 or 4 is frightened or made uptight by looking at "Show Me." Adults are.

Senator SPECTER. How do you know that no child is?

Mr. MCCORMACK. Well, I have never encountered one. And I have children.

Senator SPECTER. How would you know if you had encountered one?

Mr. MCCORMACK. Do you know anything about your own children and their reactions when they see books? I have children. My son was 8 and my daughter was 3 when I first brought this book into my house, and I showed it to them. They looked at the book, turned some pages, closed it, and went and watched Star Trek with exactly the same intensity of involvement. If I can bring them into adulthood with that equanimity of response to sexual matters, I think I will have done a good thing with my children.

Senator SPECTER. When you published the book, there must have been a great many pictures that you left out.

Mr. MCCORMACK. There were pictures that were left out of the American edition based on the German edition. There was a German edition. The book was originally published in Germany by a Lutheran sponsored children's book publisher. We translated the

book and changed it slightly, but I can tell you ahead of time that the pictures that were left out were some of them of no attackability at all and others perhaps of attackability, but they were not taken out with any consideration for whether or not they were legal or not. From time to time, we take something out that does not flow into the narrative, that is all.

Senator SPECTER. But even prior to the publication of the German book, do you know if some photos which were considered for inclusion in that book were excluded?

Mr. MCCORMACK. Oh, I am positive that is the case. Will McBride, in my guess, took hundreds and hundreds of photographs.

Senator SPECTER. When you come to the question of whether or not there is any harm done to the subjects whose photos are being taken, which is an objective of the statutes, what is your thinking, Mr. McCormack, on the picture that you referred to with the young boy and the young girl, as you say, obviously under 16 years of age, with the young girl fondling the boy?

Mr. MCCORMACK. Yes.

Senator SPECTER. Do you think there is any grounds for concern about damage to those individuals who are the subjects of the photography?

Mr. MCCORMACK. I honestly do not, Senator Specter. I do not think it is ridiculous for other people to be wary. But it does seem to me that they have no concern here.

I have a fair sense of surety that nothing happened to these children. I have talked to Fleischhauer-Hardt and Will McBride since this book was created. The pictures were taken in Germany some 10 years ago. The children did know what they were being asked to do. They knew the book that was coming out of it and they were not being asked to do anything that was outside of their normal conduct anyway. It is the case that sexual games between children, younger than the age of 16, taking place, that took place here, and he did not take people who were totally extraneous to this sort of conduct.

Senator SPECTER. Do you think it is desirable to have legal prohibitions to protect children from being subjects or models for some type of sexual explicit conduct?

Mr. MCCORMACK. I cannot give you a universal on that, Senator. Do I think it is desirable? No. Because it seems to me you have got to qualify——

Senator SPECTER. So you would not have any laws on the subject?

Mr. MCCORMACK. Oh, no, you would, but you would have to qualify.

In other words, you cannot, it seems to me, if you simply say that every single book that has a picture of sexual conduct between children under the age of 16 is damaging, illegal and ought to put someone in jail, then it seems to me that you are doing something wrong. Exactly why I am coming here today is to try to help you draw the distinction between those cases which I absolutely agree do exist, there are books that I would look at and say that is bad. And something bad went on in the creation of that book. But there are also books and films that I would look at and say, now, that is not bad and any law aimed at knocking out A, that also knocks out B must have been faultily drafted. Because we do see the distinc-

tion. It seems to us then we must be able to articulate the distinction and that is why I am here.

Senator SPECTER. Mr. McCormack, how would you draw that standard?

Mr. MCCORMACK. The standard that I am urging on you is that if you can look at a work—at this moment I am talking about the publications rather than the conduct; I am here talking about 52 and 53 in the first instance. If you look at the publication and believe, or a jury can believe, this book does have serious educational and scientific value for some, then it seems to me that there should be no crime involved in selling it, transporting it, or if we extend back to 51, about which I did not come here necessarily to talk perhaps about the creation of it, I do know that the law, as it is currently stated, would allow police to go in and take Dr. Helga Fleischhauer-Hardt and Will McBride and put them in jail for 10 years. And I have the strongest instinct I can possibly express, Senator, that there is something wrong with the law like that. I know these people. You may not agree with them. I may not agree with them, but I know they do not belong in jail, and the law as currently phrased would put them there. So there must be something wrong with that law.

Senator SPECTER. Senator Grassley?

Senator GRASSLEY. I think at this point I would emphasize once again for the record that regardless of the good motive, or without even questioning the motives of the writer, that we are not concerned with the motives of the author. And the author of "Show Me" would be one author we could use as an example.

What we are concerned about is the psychological well-being of the minor. We are here to protect these children. I think Justice O'Connor put it eloquently when she said in her concurring views in the *Ferber* case that the audience's appreciation of the depiction is simply irrelevant to New York's asserted interest in protecting children from psychological, emotional and mental harm. I do not think we want to lose site of the purpose of the statute, lose sight of what the unanimous Supreme Court decision held. They were focusing strictly upon the psychological abuse of children.

One other point in the opinion that I could refer to, and I will ask you for your views on this. I do not think you expressed them quite to this point. The opinion states that the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to sexual abuse of children.

Do you accept that? Do you agree with that?

Mr. RICH. Senator, may I make an effort to respond, please?

Your point is obviously well taken. However, I think there is a logical and defensible nexus between a carve out of the type that Mr. McCormack and I have been suggesting for the literary, et cetera, work and the issue of the child abuse.

I think the very same opinions from which you are quoting, indeed Justice O'Connor's opinion, conceded that the New York statute might in fact be overbroad in banning depictions "that do not actually threaten the harms identified by the court." Justice Brennan similarly, in suggesting the need for a carve out for serious works, said it is absolutely clear in his mind, at least, that

where a work has serious value, by definition, it cannot be viewed as harmful.

I guess what we are suggesting is that the milieu, the context in which works are created—if you will, the setting in which, in all likelihood, "Show Me" was created—is likely to have been so vastly different than the clandestine use of runaway children about which the record before the Congress and elsewhere is so clear, the susceptible individual to the pornography industry, that those two contexts, Senator, in our minds at least, are so very different that the potential abuse to the child, derivatively, is also perceived to be very diffeient. So we have less problems conceptually with justifying the existence of works and their dissemination where those works are believed to have serious value because we think relatedly there is likely to have been far less potential for child abuse in connection with the creation of those works.

Senator GRASSLEY. Are you aware that this book "Show Me" is in adult pornography shops and is a big seller?

Mr. RICH. I am not personally aware.

Mr. MCCORMACK. I can believe that. If you go into an adult pornography shop, you will find many works that I do not think any of us would think of in the first instance as belonging there. But they surprise us. Things that can be abused by common man are uncountable, and there are those who can find an abuse for the magazine Vogue. And it does not seem to me that that is necessarily a condemnation of the book. But I am aware of that.

Senator GRASSLEY. Is it not difficult to prognosticate that the children in "Show Me" in the context in which it is taken could be affected by the pictures when the Court refers to the fact that the psychological impact of those pictures could be very strong. When you think in terms of looking down the road, you know, several years, do we know really what that impact will be, and since we do not know, should we be overprotective of the individual and of the child? Does it not almost dictate that course?

Mr. MCCORMACK. I think not, Senator, only because if that kind of justification for overbroadness would carry to all of your legislation, I think many bad things will happen to our laws. It is my conviction that there is a distinction in the experiences of children in "Show Me" and the experiences of the children in the 42d Street films.

Now, I think this is an honest conviction. I may be wrong. But it is also the case that people who insist that children in "Show Me" can be damaged are also wrong. I tell you that the taking of these photographs were so entirely different than the taking of the 42d Street film that it is not unreasonable for us to believe that there will not be a damaging effect on these children that there just could conceivably be for the children in the 42d Street film. There is a distinction. We want the law to recognize that distinction and not say that we know that it had to be damaging to the children in "Show Me" and, therefore, we know that we will have to go to jail. That is wrong, Senator.

Senator GRASSLEY. I take it that you believe that book would violate the New York regulations.

I would like to ask you, would illustrations rather than photographs violate the rule?

Mr. MCCORMACK. In other words, if these had been drawings in the book, as "In the Joy of Sex"? I think it would depend on where those illustrations came. If the artist who drew the illustrations had children stand in particular poses, if they were under 16—according to my reading of the statute, yes. Because it would have been putting together children to perform conduct that is proscribed, and that conduct is then depicted. Whether or not it is depicted through the medium of cameras or pen and pencil I think is irrelevant to the wording of the statute.

Senator GRASSLEY. The extent to which illustrations are only representative and are not actual photographs of the individual, I think it is clear that long-term illustrations have less of an impact upon the individual, even consider posing, than obviously a photograph would be----

Mr. MCCORMACK. I agree if your point is that you can draw someone with a different face, you certainly can do that. Photographs were chosen very explicitly by Fleischhauer-Hardt. All of the books prior to "Show Me" about sex education had this implicitly in there. In fact, the largest selling sex book before "Show Me" was a cartoon book that talked very literally about seeds and eggs, but it had one illustration in the whole book about what actually happens between human beings. And this was an illustration of mommy and daddy, a cartoon picture, with the blankets drawn up to their chin. Children are very smart at picking up implicit messages, and clearly there is an explicit message here, that is that something unspeakable is going on. It must be awful. Exactly what Fleischhauer-Hardt was going on, that is how you create the abuse in children, feel guilty and have some fear because there is something awful here. She said the only antidote to that is photography. Rightly or wrongly, that was her sincere view. That is why she chose photographs and not drawings.

Senator GRASSLEY. For Senator Specter, who had to step out momentarily, I want to say thank you very much for your participation.

Let me also suggest that since other members of the subcommittee are not here, you might get questions from other members of the committee and we would request very much that you would respond to all of them.

In addition, the record will be open for a short period of time if you have anything else that you want to insert for inclusion in the record.

Mr. MCCORMACK. Thank you, Senator.

Mr. RICH. Thank you. We would be happy to respond to any further questions.

Senator GRASSLEY. I would call the next witness, Mr. Robert Pitler, bureau chief, appeals bureau, district attorney's office for New York County, Manhattan.

Would you come and also introduce your associate?

STATEMENT OF ROBERT PITLER, BUREAU CHIEF, APPEALS BUREAU, DISTRICT ATTORNEY'S OFFICE FOR NEW YORK COUNTY (MANHATTAN), ACCOMPANIED BY DONALD SIEWERT

Mr. PITLER. Sitting to my right is Donald Siewert who was co-counsel on the *Ferber* case. I was fortunate enough to argue that case in the Supreme Court of the United States and then again in the court of appeals after it was remanded to that court.

Senator GRASSLEY. We would ask that you proceed then in accordance with whatever instructions you were given.

Mr. PITLER. The first question I would like to address is whether the obscenity requirement should be eliminated from the Federal statute. Of course, as the Supreme Court made clear in *Ferber*, there is no constitutional bar to doing so. Eliminating the obscenity requirement would serve a solutary purpose in bringing the Federal law into conformity with the 19 States which prior to the *Ferber* decision, had no requirement of obscenity, and also in accord with those States which would also eliminate the obscenity requirement. The Federal statute would then interlock with those State statutes to afford significant protection to children across the country.

Throughout the *Ferber* litigation, lawyers for the groups who testified previously kept saying that there were many valuable books out there which would be encompassed by the New York statute yet, today's hearing, like the hearing before the Supreme Court of the United States, ends up talking about just one book. Thus, it seems there are not so many books out there, if more than one or two which would be affected by this legislation. If this is correct, the price you pay seems small in comparison to the protection to be afforded children by enacting the legislation.

Senator Specter has proposed an amendment to eliminate the term "lewd display of the genitals" and replace that with the term "display of the genitals or pubic area, which has no serious artistic literary or scientific value."

We believe that it makes more sense to follow the New York statutory language, which the Supreme Court found constitutional. Moreover, the proposed term "without serious artistic value" is vague compared to the present term "lewd display of the genitals." Indeed, the Supreme Court said that "lewd display" was a term not unknown in this area of the law and therefore had a meaning that would be helpful.

The Federal statute also is deficient in that it has no definition for the term "simulated." The statute prohibits both actual and simulated sexual conduct, and it would be a good idea for the Congress to define the term "simulated." In our written statement we have suggested a definition that comes directly from the New York statute.

The idea that we should look at the whole work rejects a fundamental misunderstanding of the statutory purpose. The purpose of the legislation is to protect children. A child can be abused sexually or suffer present or future emotional damage even if there be only one sexual scene in which they are made to perform. You can have an absolutely beautiful movie but if a child is made to engage in sexual conduct in that movie, the child is injured by that performance. It does not make a difference to the child, as you said,

Senator Grassley, in quoting Assemblyman Lasher and the Supreme Court of the United States, that the book has literary, scientific, or artistic value if the child has been psychologically, emotionally, or physically injured in the making of the material.

Also in reference to the term "lewd display of the genitals," a concern was expressed about medical textbooks. That same argument was made before the Supreme Court and the New York Court of Appeals. Still, if you look at the pictures in medical textbooks, none could characterize those pictures as lewd. We hear these absurd arguments to make a point and then you look at the reality. In the *Ferber* litigation any number of books were cited, and finally it all boiled down to one book published in the United States that might come within the statute. Again, even if that book is covered, that seems a pretty small price to pay for protecting children.

Two subjects raised in our written statement concern possible defenses under the statutes. I realize this is a Federal statute and you are talking about interstate on transportation to some extent, these defenses may not come into play, they may not. There are two categories of the so-called defenses. One is what I call the dissemination category, and that would protect particular forms of dissemination. For example, a librarian in Vermont lends a book to a library in a New Hampshire town only a couple of miles away. Such an interlibrary loan of prohibited book would fit under the statute. Still, it seems that such a loan should not be treated as violation of the statute.

Another example might involve a doctor who has had success in treating a patient by showing him a movie that might come under the statute. A doctor in another State finds out about the treatment and asks for a copy of the film. The first doctor sends a copy of the film to his out-of-town colleague.

It is possible that there should be a statutory exemption for such medical or scientific exemption. Indeed, the Constitution might even require such an exemption.

In that regard, at page 16 of our statement, we suggested, if you are interested in doing so, a way to phrase an affirmative defense. The last example we gave in the statement involves bringing the films that were involved in the *Ferber* litigation to Washington today. Technically, I would be violating the statute. Now, I have no fear of prosecution. Indeed, if the committee requested it, I would have brought the films. Since the committee did not request them, I am just as happy not to bring the films. But it seems that these are situations where there should be dissemination exemption within the statute itself or the courts should recognize that such exemptions are constitutionally required.

The second exemption category is what we call the content exemption. This is the most difficult problem.

Senator SPECTER. Do you really think you might have been prosecuted, Mr. Pitler?

Mr. PITLER. No, not at all. I would not have had that fear at all.

Senator SPECTER. When I was district attorney, I seriously considered on one occasion whether to prosecute someone for wiretapping. The Pennsylvania wiretapping statute said it was illegal to disclose or disseminate any of the wiretapping information. And I disclosed and disseminated it to my assistants for aid in assistance

in deciding whether or not to bring the prosecution. And somebody on the outside said that I was to be prosecuted for disseminating the wiretap information, which is somewhat analogous to your situation about being prosecuted for carrying the movies to the Senate hearing.

Mr. PITLER. I am not sure the analogy is correct. It would depend whether the Pennsylvania statute—you are more familiar with it than I—prohibited unlawful dissemination. It would not be unlawful to circulate material within your office for legitimate law enforcement purposes. That circulation would not be unlawful and therefore would not literally violate the statute.

Literally, regardless of the purpose, carrying across State lines photographs or films that depict sexual conduct of children would violate the statute. There is no requirement of unlawful in the statute.

Again I do not think there is a real threat of prosecution. Still, the committee should be aware of the various situations involving dissemenation for medical, scientific, education, legislative, or other lawful purposes which literally are covered by the statute. To deal with these situations a statutory exemption might well be desirable.

The other category of potential overbreadth involves content, that is the film which has a single scene containing sexual conduct by a child. For example, if that film is one of the 10 most beautiful ever made and it has that one scene in it, and perhaps it is made in Europe, should the film be prohibited from being brought into the United States? This is a most difficult question.

In my written statement, I suggested that there are so many factors involved that both the Supreme Court and the court of appeals both decided to deal with this problem on a case-by-case basis to see what kind of exemption, if any, should be enacted. The Congress would be wise to await those case-by-case adjudications before dealing with the problem.

I just want to return to a couple of matters brought out by those who previously testified. In particular it was suggested that no child is harmed because some pictures are taken in an easygoing manner. Brooke Shields brought a lawsuit in New York to stop the distribution of photographs, not within the New York statute, to which her mother consented when her daughter was 10 years old. The reason the lawsuit was brought was Ms. Shields was completely embarrassed about the pictures. Embarrassment even of easy going photographs stays with you an awfully long time. A child has no choice and is in no position to consent to those pictures. I do not know the reaction of the children in the book "Show Me," when the photographs were taken for that book. It is hard to believe that they are thrilled, knowing that book is being circulated. Harm can take many different forms. It does not have to be sexual abuse in the traditional sense. The harm can occur sometime down the line. The Congress and the States should be able to exercise their police power to protect children from psychological or physical harm when the conduct takes place or from embarrassment or psychological trauma some time later.

[The prepared statement of Mr. Pitler follows:]

PREPARED STATEMENT OF ROBERT M. PITLER

Thank you for the invitation to testify concerning proposed changes in the Sexual Exploitation of Children Act of 1977 (18 U.S.C. §2251-53).

The 1977 Act recognized the grave harm to children who are made to engage in sexual conduct for purposes of visually reproducing that conduct. However, the act prohibits the knowing interstate transportation and shipment or mailing only of obscene materials depicting the sexually explicit conduct of a child under sixteen years of age. In requiring proof of obscenity, the Congress was concerned with the constitutionality of any statute which did not require proof of obscenity. In addition, many people expressed the view that all hard core material depicting the sexual conduct of children was by its very nature obscene. Thus, it was thought that even by requiring proof of obscenity the statute would still be an effective deterrent.

Now the Supreme Court in Ferber v. New York has held that, given the compelling interest in protecting children, proof of obscenity is not required to validate

legislation which prohibits the dissemination of child pornography. Interestingly, in reaching that conclusion the Court relied extensively on the 1977 Congressional hearings as well as the Senate Report accompanying the Sexual Exploitation Children Act. Accordingly, the obscenity requirement should be eliminated from the statute. In addition, there is every reason to eliminate the obscenity requirement because there is no merit to any argument that it is unnecessary to remove that requirement from the 1977 Act because all child pornography is inherently obscene.

The belief that a ban on the distribution of obscene materials alone would discourage distributors from dealing in child pornography ignores the reality that the obscenity laws have failed to discourage the distribution of obscenity. The deterrent value of a statutory ban on obscenity is effectively undercut by the difficulties in prosecuting obscenity cases successfully. The same difficulties in the prosecution of obsecenity are present in a prosecution for disseminating materials depicting sexual conduct of children when a successful prosecution turns on proof of the obscenity of those materials.

To begin with, the deterrent effect of obscenity laws is diminished because the concept of obscenity is complex, and its application to particular cases is a matter of considerable delicacy, resting on often highly elusive criteria. For example, defense counsel have argued successfully that, even though the materials at issue in a particular case are disgusting, they simply do not appeal to the prurient interest in sex of either heterosexuals or any definable sexually deviant group, or they argue that materials are not patently offensive by community standards.

Indeed, in the Ferber case itself defendant was charged with two crimes, one of which required proof that the films sold were obscene. The other crime did not require proof of obscenity. Defense counsel agreed that these films were disgusting and offensive and told the jurors that they could well find the films repulsive, but still he called for an acquittal of the obscenity charge because the prosecution failed to prove the films appealed to the prurient interest of the particular group identified by the prosecutor. And the jury, then acquitted Ferber on the obscenity charge. Regardless of the reason for acquittal, this very case shows that the obscenity standard is easily manipulatable, and that its

deterrent effect is thus at best questionable. As seen from Ferber's conviction on the charge of disseminating material which, regardless of whether or not it is obscene, depicts the sexual conduct of children, a prohibition which does not require proof of obscenity is not so easily avoided.

The deterrent effect of the ban on obscenity is also undermined by the requirement that the work in question must be examined as a whole. Defense counsel may succeed in persuading a court or a jury that despite one or two or even a substantial number of scenes of a child engaged in sexual conduct, a work has serious value when considered as a whole. The requirement of examining the work as a whole would permit film-makers to exploit children sexually and avoid prosecution by clothing that exploitation with the thinnest of story lines or other non-sexual material. In addition, the "entire work" could permit publications which have been found not obscene to present a "child of the month" in various sexual poses or acts.

More importantly, even with so-called serious materials, the obscenity requirement of taking the work as a whole does not protect the child who is abused sexually in the production of that work. This is the reason why the New York Legislature chose to prohibit the

dissemination of both non-obscene and obscene materials depicting children engaged in sexual conduct. As pointed out by a sponsor of the New York statute, "It is irrelevant to the child whether or not the material is obscene or has a literary, artistic, political or social value."

The Supreme Court quoted this last statement in concluding that the obsenity standard is not a satisfactory solution to the problem of child pornography. _____ U.S. at _____, 102 S. Ct. at 3357. The Supreme Court's reasoning is unexceptionable:

> The Miller standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the Miller test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. ____ U.S. at ____, 102 S.Ct. at 356-57.

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Given the statutory purpose of protecting children from exploitation in the production of materials which are produced by making the children engage in sexual conduct, it is incongruous to prohibit the dissemination of obscene materials alone. Such a limited prohibition would permit transporters of child pornography to defend against a charge of distributing a child's sexual performance, e.g., a film or photograph, by showing that the performance at issue is not obscene, however harmful and sexually exploitative it might be. Thus, the obscenity requirement does not present an effective alternative to the prohibition of dissemination of both obscene and non-obscene materials.

Importantly, in light of the Supreme Court's decision in Ferber, more and more states can be expected to enact legislation similar to the New York statute. Bolstered by a congressional enactment, all of the state statutes would interlock, thereby make each jurisdiction's law all the more effective. In this regard, I note that Senator Spector's amendment would eliminate the term "lewd exhibition of the genitals" which is found in the New York statutes as well as those in many other states, and replace it with "exhibition

without literary, artistic, scientific or educational value" of the genitals or pubic area.

The Supreme Court expressly held that the term "lewd exhibition of the genitals" was not overbroad and impliedly held that it was not vague by noting that the term was not unknown in this area of the law. _____ U.S. _____, 102 S.Ct. at 3359. That term means more than mere nudity and describes a patently offensive, lascivious, lustful or obscene display. Given this definition and the Supreme Court's upholding use of the term "lewd exhibition of the genitals," it might be judicious to retain that language in the federal statute. Moreover, the phrase "exhibition without literary, artistic, scientific or educational value" seems no more precise, and perhaps even vague in contrast to the present term "lewd exhibition."

Of course, the idea behind the amendment is salutory, that is, to provide protection to valuable speech which might be encompassed by the ban on lewd genital display. This concern was also expressed during the Ferber litigation by a group of book publishers who participated as amici curiae and cited several books that contained pictures which they believed could be characterized as "lewd exhibition of the genitals." That

concern, however, was without foundation because the amici ignored the fact that the term lewd means more than mere nudity.

And none of these works cited by amici had pictures which could be described as lewd.* It was absurd they were even offered as examples. Significantly, not one of the books proffered depicts any sexual conduct of a child under the age of sixteen.

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*See, Nude Photographs, 1850-1980, pp. 47, 78, 125 and 134 (C. Sullivan ed. 1980) (four photographs are of a single child simply standing nude); E.A. Ruby, The Human Figure: A Photographic Reference for Reference for Artists, pp. 309-317 (1974) (a series of innocent photographs of a two year old girl); The Family of Children, pp. 84-85 (J. Mason ed. 1977) (six photographs of naked children at play, but in a totally innocent and sometimes charming way); M. Mark, Falkland Road: Prostitutes of Bombay (1981) (two photographs of thirteen and fifteen year old prostitutes with only their breasts exposed; one photograph of two sons of prostitutes lying nude on a bed); D. Hamilton, Sisters (1973) (photographic story of two young sisters of an unknown age. Some of the photographs show the girls' breasts and one girl touching the other's breast, but no genitalia are shown).

Amici publishers also pointed to several "sex education" books,* the dissemination of which they contend would be criminal under the New York statute. Again, amici publishers, for the most part, based their conclusion on a misunderstanding of the term "lewd exhibition of the genitals," which, as noted, does not include mere nudity. Moreover, it is clear that the vast majority of nude models in these works are over sixteen or are of an undeterminable age;** of course there can be no prosecution if age cannot be determined.

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*See, S. Waxman, Growing Up Feeling Good: A Child's Introduction to Sexuality (1979) (two series of pictures of children getting dressed; one of a young girl, the other of a young boy. Two other pictures, one of a nude boy, the other of a nude girl, the age of each may be over sixteen); S. Waxman, What is a Girl? What is a Boy? (1976) (two photographs, one of a nude baby boy and the other of a nude baby girl; one photograph of a nude young boy, and another photograph of a nude two or three year old girl); M. Goldstein, E. Haeberle and W. McBride, The Sex Book: A Modern Pictorial Encyclopedia (1971) (pictures of nude children, some showing genitalia); W. McBride and Fleischhauer-Hardt, Show Me! (1975) (pictures of nude children, some touching their own genitals and one of a young girl simply touching the penis of a young boy); and G. Nass, R. Libby and M. Fisher, Sexual Choices (1981) (at page 241, photograph of a one or two year old girl playfully and innocently holding on to the penis of a boy of the same age; nude photographs of a single child at pages 39, 50 and 281 which do not show gentialia).

**See, e.g., Growing Up Feeling Good, supra, note 9 at pp. 30 and 34; The Sex Book: A Modern Pictorial Encyclopedia, supra, note 9, at pp. 26, 31, 37, 83, 85, 86, 130-31; Show Me!, supra, note 9, at pp. 88-89, 100-01, 104-05, 106-07, 112-13, 158-60, 166-69.

Amici publishers also expressed a concern over the statute's effect on the availability of sex education materials. Given the narrow definition of lewd exhibition of the genitals, and the ability to use models over the age of sixteen, it is not credible to argue that somehow the ban on dissemination of materials depicting children engaged in sexual conduct or in a lewd genital exhibition will preclude parents from educating their children about sexual matters.

Additionally, Ferber, pointed to two popular movies, Pretty Baby and The Exorcist, as works which would be encompassed by the New York statute. In Pretty Baby no sex act of a child is shown, nor is there any lewd display of the genitals or the pubic area. The only scenes depicting child nudity are one in which a baby is nursed by her mother, one in which young girl (Brooke Shields) simply poses nude for a photographer and another scene in which she is getting out of a bathtub. In the bathtub and posing scenes, her breasts and buttocks are exposed but there is no exposure of genitalia and though the pubic area may have been briefly exposed there is no way that that exposure could be characterized as lewd.

In The Exorcist, there is no lewd display of the genitals of a child. The only sex act even remotely

suggested occurs for a brief second when it is made to appear that the young girl (Linda Blair), who is fully covered in a sheet or nightgown, thrusts a crucifix between here legs under the gown. It is impossible to say that any actual sexual conduct is taking place in this scene; even if it could be said that sexual conduct was being "simulated," that simulation does not fit within the federal statute because it is not accompanied by any nudity.

In this regard it is important to re-emphasize that neither the present federal statute nor the proposed amendments would encompass acts of simple nudity, although there is a prohibition of lewd exhibition of the genitals. Under the federal statute, nudity would be encompassed only when it is accompanied by simulated sexual conduct, that is, the explicit depiction of the enumerated acts. Notably, the present federal statute as well as the proposed amendments do not define the term "simulated." Perhaps a statutory definition would be helpful. New York Law Section 263.00(6) defines "simulated" as meaning "the explicit depiction of any of the [defined sexual conduct] which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals or buttocks." By not

prohibiting simple nudity, the federal statute, like other state counterparts would allow producers ample room to express an idea, convey a message or tell a story about the sexual conduct of children.

Further, the statute has no application when actors or actresses or models over sixteen years of age are used to portray children of lesser years, and persons over sixteen are generally available. As an illustration, although the producers in the 1980 Broadway production of Lolita auditioned seventy-five girls under fourteen for the title role, they finally chose a twenty-four year old actress to play the part. In the production of motion pictures as well, the availability of doubles, the absence of a prohibition on mere nudity and the use of sophisticated cutting techniques leave ample effective means of portraying sexual conduct without having a child under sixteen engage in a sexual act. A double was used to film Brooke Shields' nude scenes in The Blue Lagoon and Endless Love.

In short, as recognized by the Supreme Court (_____ U.S. at _____, 102 S.Ct. at 3357), the producer has sufficient lawful means to tell his audience about the sexual conduct of a child without subjecting a child

to sexual abuse, and it is unlikely that the public will be deprived of anything of value because of a prohibition on the dissemination of material produced by sexually abusing children. The desire of those who insist that they want the "real thing" must be subordinated to the compelling interest in protecting children.

Even if the production or dissemination of a few works of arguable value are discouraged by an amended federal statute, that would be a small price to pay for protecting children from substantial evil. Still, the failure of respondent and amici publishers in the Ferber litigation to identify books and films which they believed deserved protection but which would in fact be encompassed by the statute, is a tell-tale sign that their First Amendment concerns are divorced from reality. Significantly, among the amici in Ferber were publishers who, presumably, have access to virtually all books ever published. And of all of the books ever published, they were able to point to so few which they opined could be encompassed by New York Statute, even though they maintained that the statute was so substantially overbroad. Of these works, it is certain that all except one were not included within the statute. That so few books or movies have been found is not surprising,

because ideas about the sexual conduct of children can be and almost always are expressed without making a child engage in such conduct. In the unlikely event that a few such books or movies exist, or will exist in the future, which are within the statute but entitled to protection, case by case adjudication would provide adequate protection.

Both the Supreme Court and the New York Court of Appeals, when upon remand it upheld the statute under the State Constitution, recognized that situations could arise in which the statute could be applied unconstitutionally. Each court believed that any such unconstitutional application could be dealt with on a case by case basis. This raises the question of whether the federal statute should be amended to include any defenses to criminal prosecution or whether it should be left to be courts to develop those defenses on case by case method.

There are two distinct categories of situations in which the statute could be held unconstitutional as applied. The first category of potential overbreadth includes certain kinds of dissemination without regard to the content of the material disseminated. For example, consider a librarian who circulates a book which has

photographs of children engaged in sexual conduct. Under New York law (Penal Law §263.20) that librarian who acts in the normal course of employment has an affirmative defense to a criminal prosecution for disseminating proscribed materials. Perhaps, such a defense need not be provided by the federal statute which bans only interstate transportation and shipment or mailing and it is difficult to envision a librarian mailing or carrying prohibited material between states. On the other hand, inter-library loans might occur more frequently than one would imagine, especially in those areas where one state borders another state.

Take another example, a psychiatrist who has had success treating child molesters by showing particular photographs or movies, depicting children engaged in sexual conduct. Under New York law there is no defense for the doctor, nor would there be any defense if the doctor lent his film to another doctor to enable the other doctor to treat a patient. Despite the absence of any statutory defense, it surely would be held that dissemination for a legitimate medical or scientific purpose is constitutionally exempt from prosecution. Finally, assume that I have brought with me some child pornography as examples of what is presently being produced and disseminated. In bringing the films from

New York to Washington, I have transported them interstate and there is no statutory exemption, even for dissemination to the Congress. Nonetheless, prosecution in either the doctor or legislative context is extremely unlikely. If such prosecutions do arise, a court could adjudicate a claimed constitutional defense case by case. Thus, it may be unnecessary to provide a statutory defense. Still, if a defense is desired, it could be drafted something like:

> In any prosecution under Section 2252, it is an affirmative defense that a person who knowingly transports, ships, or mails materials depicting sexually explicit conduct of children did so for a legitimate scientific, educational, or governmental purpose, or with some other similar justification.

The second category of potential overbreadth is the situation somewhat similar to that posited by Justice Stevens in his concurring opinion in the Ferber case. Assume a film produced in Europe contains a single brief scene of a child engaged in sexually explicit conduct. The film, however, is a classic, perhaps one of the ten best ever made. Should distribution of that film be prohibited in this country? Does it make a difference if the film was made before 1977 or before 1982? Does it

matter whether the film will feed the child pornography industry in this country?

As the questions suggest, the issue is not an easy one and there are many factors which should be explored before recognizing a First Amendment defense for distributing a particular film. These factors might include, but are not limited to: how much of the whole work is devoted to showing explicit sexual conduct by children, whether the portrayal is essential or necessary to the work as a whole, whether the particular work feeds the child pornography industry, when the work was produced, where it was produced and perhaps even the national origin of the child.

The exact nature of a defense based on content, if such a defense should be constitutionally required, and the burden of proof entailed are complex questions which are difficult to consider in the abstract. This difficulty led the Supreme Court and the New York Court of Appeals to wait until the litigation of concrete cases to deal with the potential, albeit limited, overbreadth of a child pornography statute. While the legislative branch of government is certainly better equipped to legislate a defense, such a defense involves a complex interplay of relevant factors, so perhaps Congress too should rely on the case by case approach, thereby avoiding too broad or too narrow an enactment.

Senator SPECTER. Senator Grassley?

Senator GRASSLEY. Mr. Chairman, I have one or two questions, but I am going to have to leave when I am done because I have a Finance Committee meeting that I have to go to on the tax bill. So I want to thank you for letting me participate.

I would like to ask, sir, is it reasonable to think in terms of exempting what are referred to as legitimate publications and illustrations like medical journals—and I only use that as one example, I assume that maybe there are others that fit in that category—of exempting them from the law?

I want your view on that.

Mr. PITLER. No; you could expressly exempt medical textbooks or journals.

Senator GRASSLEY. Yes.

Mr. PITLER. You could do that, but then, of course, everyone who has related interest would say if you exempt them, we have works that also should be exempted. Then the question arises where to draw the line. I think the statute as written realistically cannot be interpreted to cover medical journals. There is no real fear of criminal prosecution. Notably, no publisher of any respectable medical journal has taken it off the market as was done with "Show Me." And there is just no chance of prosecution.

So the answer, as a practical matter, is that once you start with medical journals, then you have to deal with special interests who come in and ask for exemptions. That poses a problem.

Senator GRASSLEY. Thank you. That is all I have.

Senator SPECTER. Thank you very much, Senator Grassley.

Mr. Pitler, do you think "Show Me" is prosecutable under the existing statutes?

Mr. PITLER. I think a prosecutor could decide there is probable cause to believe that the book would violate the statute.

Senator SPECTER. Now, you have a lofty position, you are chief of the appeals division. I know that is a lofty position because I once had it myself.

But suppose you were asked to make the judgment is there a prima facie case here? You said that there would be sufficient evidence for a prima facie case. Now, will you go beyond that step if the judgment were yours and exercise your judgment to initiate a prosecution?

Mr. PITLER. Well, the answer to the question is yes, I would go beyond the step. But let me just answer it a little bit more in depth.

Senator SPECTER. Shall we give Mr. McCormack a chance to flee?

Mr. PITLER. That is not necessary, our office has no jurisdiction here.

That book was first brought to our office's attention 4 or 5 years ago, by hauling us into Federal court because the publisher wanted to enjoin any prosecution under the New York State statute that had just been passed. And we looked around and said what book? We did not even know about the book. In an affidavit filed in court we said that we had no intention of prosecuting the book at that time. The district attorney made that judgment back in 1977 or 1978 when the statute first came on the books.

Senator SPECTER. It is a rather unusual procedure, is it not, to initiate an injunction proceeding to stop the prosecutor from doing something he has not announced an intention to do?

Mr. PITLER. Yes. The second circuit so held in reversing, saying that there was no justifiable controversy.

Senator SPECTER. The district court issued the injunction?

Mr. PITLER. Yes, it did.

Senator SPECTER. Mr. Gainsburg, were you a party to that proceeding?

Mr. GAINSBURG. Yes.

Senator SPECTER. Why did you initiate that action, if I may ask?

Mr. GAINSBURG. Well, if you remember, Senator, the book had been prosecuted already under the obscenity statute.

Senator SPECTER. But not in New York City.

Mr. GAINSBURG. Not in New York City, but New York is a large State and we were not--there are four corners of New York State.

Senator SPECTER. Well, you did not bring in all the prosecutors. Would that action have been binding on all the prosecutors of the State?

Mr. GAINSBURG. We brought in the Governor of the State.

Senator SPECTER. He is not the prosecutor, is he?

Mr. GAINSBURG. Well, we felt that that would be binding on all of the prosecutors. But in the situation where we had——

Senator SPECTER. Is that not a rather risky proposition going to the D.A. and saying I want to enjoin you from prosecuting the book—calling the book to his attention in the process?

Mr. GAINSBURG. Senator, the book was well known. The book was before the legislature in New York.

Senator SPECTER. Did you know about it, Mr. Pitler?

Mr. PITLER. We never saw the book, never heard of the book. The first time we ever knew about it was when we were served with papers. The first thing we did was to get a copy of the book.

Senator SPECTER. At times, it is amazing how little people really do know.

Mr. GAINSBURG. The book was before the New York State Legislature when they enacted the Child Pornography Statute.

Senator SPECTER. Were they aiming at it?

Mr. GAINSBURG. Yes; there were articles in the paper.

Senator SPECTER. Did any New York State prosecutor ultimately bring an action?

Mr. GAINSBURG. No, because we had an injunction.

Senator SPECTER. But it was overturned I am told by the second circuit?

Mr. GAINSBURG. Well, a long time later, it took 2, 3 years before the injunction was dropped. The court, the second circuit, agonized for a long time and then finally, after *Ferber*, the statute was declared unconstitutional. But we had real fear, Senator, because we had been prosecuting.

Senator SPECTER. How long has it been since New York prosecutors have been able to prosecute for "Show Me" if they chose to do so?

Mr. GAINSBURG. They can not now. It has been withdrawn since the *Ferber* decision.

Senator SPECTER. It has been withdrawn?

Mr. GAINSBURG. Yes.

Mr. PITLER. I have still seen it in some book stores in New York City, and there has been no prosecution.

Mr. GAINSBURG. It is not just New York also. There are 19 other States and perhaps more by this time.

Senator SPECTER. Mr. Pitler, if an affirmative defense for literary, artistic, scientific or educational value had been available in the *Ferber* decision, do you think that the *Ferber* result would have been different?

Mr. PITLER. No.

Senator SPECTER. Mr. Pitler, thank you very much. I very much appreciate your coming and very much appreciate your testimony.

Ladies and gentlemen, I would like to call to the witness stand both Detective Joseph Haggerty and Dr. John Dillingham at this time.

Detective Haggerty is from the Morals Division, Obscenity Branch, D.C. Metropolitan Police Force. And Dr. Dillingham is also a Washingtonian, codirector, special projects for the Washington School of Psychiatry.

Welcome, gentlemen.

Detective Haggerty, we will begin with you and we look forward to your testimony.

STATEMENTS OF DETECTIVE JOSEPH HAGGERTY, MORALS DIVISION, OBSCENITY BRANCH, DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT; AND DR. JOHN DILLINGHAM, CODIRECTOR, SPECIAL PROJECTS, WASHINGTON SCHOOL OF PSYCHIATRY, WASHINGTON, D.C.

Detective HAGGERTY. Senator, I would like to premise it all by saying that what is reflected in my statement is all my own opinion and not necessarily reflective of the police department. And most of what is reflected in my statement is based on my experiences on the street.

Now, I have spent basically from—since I became a police officer, but in the field of vice, I have worked the streets since 1973 within the District of Columbia. And most of what I put in here are encounters that I have had with juveniles that we had occasion to come in contact with or arrest for prostitution. And some of the recommendations that I made were based on problems that we have had in terms of prosecuting these cases.

Now, during the time that I spent in prostitution, I worked primarily with pimps, and the biggest problem that we had in that respect is that when you are dealing with a juvenile that is 13 or 14 or 15 years old, this child is subjected to testifying before a grand jury, testifying at the trial and, in most cases that I have had, it turns out that the juvenile ends up on trial. It is the defense and all the implications that they make because, in actuality, these children have participated in acts of prostitution and they are not—they are generally ashamed of it, they have lost respect for themselves, and they have been hardened by the street and they generally reflect that on the stand.

One of the things that I was recommending was that if there was—we could—in regards to Sexual Exploitation Act, we could

use as sufficient evidence the mere identity of the child and the age of the child and by other testimony from other sources to show that the child was actually, for lack of a better word, employed by this pimp to work the street so we could avoid putting the child through this process of the courts and being subjected to the cross examination of the defense.

One of the other things that I had—now like I had put before, most of my experience was based in prostitution. I have worked obscenity since November 1980, and in regards to the pornography, one of the things that I have noticed, and specifically in terms of the child pornography, is that under the Federal statute they define a child as under the age of 16. Most of your major pornographers in this country are quite aware of that law and, as a result, they employ 16-year-olds as well as older.

Senator SPECTER. Do you think the age should be raised?

Detective HAGGERTY. Yes, sir.

Senator SPECTER. What do you think it should be, 18?

Detective HAGGERTY. Under the age of 18.

Senator SPECTER. Why do you think 18 is an appropriate cutoff? Why not 21?

Detective HAGGERTY. Well, here again 18 has been our standard for this country for a long time for establishing adulthood.

Senator SPECTER. There is a major effort being made at the present time to raise the drinking age. In fact, we are having a kickoff of an effort later this morning to raise the age for drinking to 21, finding that there is a tremendous amount of fatalities in the 18- to 21-year-old category. It may be time to rethink the age on other lines, and I wonder what your experience is on that.

Detective HAGGERTY. Well, in that regard, Senator, I felt as though raising the drinking age to 21 is not going to prevent these kids from drinking. The biggest problem seems to be——

Senator SPECTER. It would make it a little harder.

Detective HAGGERTY. A little harder but not that much harder. My experience would be let us raise the age of driving. Make it they would have to get a driver's license at the age of 18 rather than 16. Then you should be able to curtail and control that a lot better than in terms of raising the drinking age.

Senator SPECTER. Well, I think it is hard to restrict people under 18 from driving under the presumption that there is something that they are going to do wrong; whereas if they drink, that is something which leads to inability to control an automobile. But it is an interesting thought.

Detective HAGGERTY. I am in no way an expert in any way, shape or form with respect to that.

Senator SPECTER. Well, I just raised the issue when you say 18, why not 21? Why do you think 18 as opposed to 16? Just mention what your considerations are on that selection of age.

Detective HAGGERTY. Well, I think another question that comes up to me is in terms of our military. An 18-year-old is eligible to become a soldier and fight for his country but he cannot drink. That, for some reason, does not make sense to me.

Senator SPECTER. The year you were born, Detective Haggerty, the national high school debating topic was lowering the legal voting age to 18. The slogan was, "Old enough to fight, old enough

to vote." In fact, it was 2 years before you were born—1944. I was a sophomore in high school when we debated that subject, and the slogan was, "Old enough to fight, old enough to vote."

Does that also mean old enough to drink, old enough to have your picture taken while nude for a magazine?

Detective HAGGERTY. If that is what we are going to set as a standard.

Senator SPECTER. How serious a problem do you think this is? How much antisocial conduct does that create?

Detective HAGGERTY. In what respects, sir?

Senator SPECTER. The posing of these 16-year-olds and 17-year-olds and younger for the magazines which are circulated? Sexually explicit magazines.

Detective HAGGERTY. Well, a lot of your pornography today is geared to using either young looking minors, young looking models, or 16-year-olds, so where it portrays as though you are looking at a child. It is even billed, you can go into an bookstore in the city today, right now, and you will see a number of magazines that it is all first line of it is young, such and such, teenage such and such. All this stuff is geared toward the younger models, which is exactly what the pornography industry is doing.

[The prepared statement of Detective Haggerty follows:]

Prepared Statement of Joseph B. Haggerty

Missing children, runaways, throwaways, abandoned or neglected children are all victims of the street. Most of these children are quickly hardened by their experiences with the vultures of the street. Usually penniless and most of the time homeless, these children will hang on to anyone who will seemingly befriend them; pimps, pederasts, pornographers and many times other victims like themselves, who lead them to the ways of survival through hustling, prostitution or pornography. This is a tight knit group and they have to learn the rules of a whole new way of life. A life which no longer recognizes them as human beings. Their bodies become the only means to survive on the street. Self respect becomes a luxury they can't afford. Drug abuse is their way of escaping their new reality. The only jobs made available to them are in massage parlors, escort services, sex films or photographs. They are hired as nude dancers or models. Their status is measured by how much money they can obtain, even though most of the money goes to their mentor. New laws govern their existence, right is doing something and getting away with it and wrong is getting caught.

From my experience on the street, working the pimps of prostitution, I discovered a number of myths concerning prostitutes. There is not a great deal of venereal disease, although most prostitutes have contracted it at least once. Heroin addiction is not that common among prostitutes because heroin is an expensive overhead for the pimp. Most of the time, if you find a junkie prostitute, you will find her pimp is a junkie too. I have encountered several incidences where the pimp beat his prostitute for using drugs. Drugs and venereal disease are not good for business. Most street prostitutes use prophylactics for all sexual encounters. Most prostitutes started in the business under age. Many have children of their own. Most of these children are farmed out to relatives or taken away by legal means.

The only way to arrest a pimp for pandering or procuring is through his prostitutes. These prostitutes must testify at both the Grand Jury and at the trial. Even if the prostitute is a juvenile, both appearances are still necessary.

I would suggest an amendment to Sexual Exploitation of Children Law should only require the identity and age of a juvenile prostitute, and testimony from other sources that he or she was in fact working for a pimp. This should be considered sufficient evidence to prove that the pimp was sexually exploiting the child.

It should be noted that in regards to this amendment and any laws pertaining to children, that these laws should include both male and female victims, as well as both male and female defendants.

Pertaining to child pornography, under the current laws, a child is described as anyone under the age of 16 years. Because most pornographers are well aware of these laws, they try to use models 16 years old or older to avoid prosecution. As a result we have lowered our moral standards so as to accept films, magazines and photographs depicting 16 year olds engaged in explicit sex acts with other 16 year olds, or men or women of older ages. I would suggest that the law be amended to define a child as anyone under the age of 18 years, and to let the people of this country decide whether the child has been exploited, through the normal jury system. Again, under the current laws, this child is still required to testify before a Grand Jury and again at trial. Too many times, it's the child who ends up on trial, through cross examination. With pronography, the film, photograph or magazine speaks for itself. The mere identity, age and corroborative testimony from other sources should be sufficient evidence that the crime took place.

Currently, pornographic films, magazines, photographs and video tapes released in this country are under no restrictions except the relatively vague obscenity laws, depending on the jurisdiction or the prosecutors. Censorship of this material is nearly impossible, but I would propose that every pornographic film, magazine, photograph and video tape released in this country be required to submit, in documented form, a list of all the names and ages of actors, actresses, models and extras, and to include the name and address of the production or publishing company, where the material was made and where it will be distributed. This would put some restriction on this material, without actually censoring the content.

Presently if a question arises of a particulat actor or actress, in regards to them being under age, it is virtually impossible for a local jurisdiction to ascertain the actor's, actress' or model's age. The purpose of the law would be to prevent producers of pornography from putting children in their films or publications. The law would make it illegal to release pornographic material in this country without this documentation and should penalize the owners and operators of these production companies, publishing companies and everyone distributing the material commerically. Also included in this law should be a clause to penalize these same people for falsifying any of the documentation.

In regards to material coming from foeign countries, this material should not be accepted unless accompanied by the proposed documentation.

Any film or publication ruled obscene under the Federal Law or made by exploiting children, should automatically be removed from the market in this country.

Senator SPECTER. Dr. Dillingham, let us turn to you at this point.

You have been a faculty member of the Washington School of Psychiatry since 1967 and you recently completed a 2-year study funded by the Department of Health and Human Services in which you interviewed 1,000 child pornography subjects in Washington, Baltimore, New York, and Boston.

What did your findings show, Doctor?

STATEMENT OF DR. JOHN DILLINGHAM

Dr. DILLINGHAM. Well, our findings showed, among other things, that the profile that was emerging from the study was of children who have some shared characteristics with the large runaway population of the United States, but some dissimilar characteristics. These are children—the children we interviewed, along with some pimps, some families, and some customers, the children we interviewed were street children, not children in—settled in suburban localities, not children who are identified as victims of child pornography in other settings.

Senator SPECTER. How did you find 1,000 child pornography subjects? How do you find children who pose for pornographic literature?

Dr. DILLINGHAM. Well, there is no traditional methodology in research for doing this. It is called field initiated research. We had a number of sources. We have had a number of previous projects which resulted in some access to the criminal underworld in the cities that we mentioned. We had some police moral squad cooperating consultants in New York City and some police informers. So what——

Senator SPECTER. What was the youngest that you found?

Dr. DILLINGHAM. Six-years-old.

Senator SPECTER. Six-years-old. What kind of pictures were taken of the 6-year-old?

Dr. DILLINGHAM. The pictures that were taken of the 6-year-old were genital exposure pictures and masturbation pictures and oral sex.

Senator SPECTER. And what is your opinion—oral sex as well with 6-year-olds?

Dr. DILLINGHAM. Yes.

Senator SPECTER. What is your opinion of the effect on children from being subjected to that kind of activity?

Dr. DILLINGHAM. I think it is very damaging, extremely damaging.

Senator SPECTER. What are the consequences specifically, as best you can specify them?

Dr. DILLINGHAM. Well, the consequences are, of course, that the children grow up with a number of deficits. They grow up with a distorted picture of sexuality and of their own role as sexual beings. They grow up with a picture of themselves as people who are exploited and people whom other people are entitled to exploit. They also grow up with unrealistic pictures of their ability to control the adult world because the fact of the adult world seeks them out with these intentions and means suggests that they can manipulate the world and, of course, they cannot. They grow up disassoci-

ated, alienated; they grow up with secret fears about what is going to happen to them, and ultimately——

Senator SPECTER. How does that arise? Could you amplify the secret fears as to what will happen to them?

Dr. DILLINGHAM. Well, if you get into extended discussions with a lot of these youngsters, they will tell you that they think they are not going to live very long. Most of them have become very, very extensively involved with drugs, and many of them, the very, very young children, it would be a little hard to develop this kind of conversation, but the children, the middle group of 12, 13, 14, 15, 16, have had some kind of exposure to family life, and those are usually fairly traditional families. And so what the youngsters will often tell you is that they will die later but that is not important, but that they will go to hell for what they do.

Senator SPECTER. What is the youngest age that you have found in the use of drugs in this group?

Dr. DILLINGHAM. I guess 8 years old.

Senator SPECTER. What is your opinion as to the——

Dr. DILLINGHAM. That would be smoking marihuana, not hard drugs.

Senator SPECTER. How about hard drugs?

Dr. DILLINGHAM. Thirteen, I guess. 12 or 13.

Senator SPECTER. What is your opinion on the issue raised by Detective Haggerty about the cutoff age at which a person should be permitted to pose for photos in the nude?

Dr. DILLINGHAM. I do not think I have a settled opinion on that. I think it is difficult to determine things like the age of consent. I think 16 is as good an age as any to set an arbitrary limit for.

Senator SPECTER. You think 16 is the right age?

Dr. DILLINGHAM. Yes.

Senator SPECTER. Better than 18?

Dr. DILLINGHAM. I guess if I had to choose, yes.

Senator SPECTER. Have you examined the book "Show Me"?

Dr. DILLINGHAM. Yes, I have.

Senator SPECTER. Do you think that that kind of a book ought to be permitted to be produced?

Dr. DILLINGHAM. No, I do not.

Senator SPECTER. Why not?

Dr. DILLINGHAM. Because I think—I am not offering a literary approval of the book. I think it has limitations as to the literary worth and also probably has some limitations as an instructional work, but I think it is basically instructional and I think the instruction that it offers is not harmful in itself. I think that it is possible for young children to be harmed by exposure to explicit photographs, but that really is a complex interplay of their family relationships and their relationship with the adults who are either permitting or helping them interpret or instructing them. I do not think on the merits of themselves that one could conclude that they are harmful.

Senator SPECTER. You are talking about the book "Show Me"?

Dr. DILLINGHAM. Yes.

Senator SPECTER. I am concerned about your opinion from two points of view.

What harm, if any, do you think is sustained by the models, the young boy and the young girl, in the book?

Dr. DILLINGHAM. OK. In order to develop an opinion on that, I would really have to know the circumstances under which those photographic sessions took place. I certainly could speculate that there are many circumstances under which those things take place which would be harmful.

Senator SPECTER. But you are saying not necessarily so; you think the law could find the necessary conclusion that simply their being in that pose and those pictures having been taken, constitute such damage to them that it ought to be prohibited by a generalization or a penal statute?

Dr. DILLINGHAM. I think it would be very hard to construct one that could give you a kind of automatic trigger.

Senator SPECTER. But it is a practical impossibility for a prosecutor to go find the children and then to investigate the circumstances under which the picture was taken. That is an unrealistic burden if you are going to go that far. You really cannot have a statute which is designed to protect children from being photographed. Do you agree?

Dr. DILLINGHAM. Yes, I agree it would be very hard to find the children. It would not be very hard to find the children in that book but it would be in commercialized exploitation.

Senator SPECTER. But you think there are other books where children have posed where it is sufficiently plain on the surface to conclude that there is damage to those children from being subjected to certain kinds of photography, or photography with certain poses?

Dr. DILLINGHAM. I think you could, yes.

Senator SPECTER. How would you define that?

Dr. DILLINGHAM. Well, I think it is almost certain that children who are involved in bestiality and involved in sado-masochistic activities, which are at the same time sexually related, I think you could find the conclusion that they would be damaged by that, yes.

Senator SPECTER. Any situations besides those two?

Dr. DILLINGHAM. I am trying to think of others but they do not readily come to mind.

What I am saying is sexual activities that have clearly violent implications and have implications which are so far removed from the statistical norm as to be of concern, those could probably practically be judged to be harmful.

Senator SPECTER. Now, with respect to the people who would look at the book "Show Me," aside from those who were being subjects, do you think it is a harmful book to have available for sale for those who would see it, children who would look at it?

Dr. DILLINGHAM. Well, again, I think that is a complex problem because it is not inconceivable that a child can look at it and have some harmful effects.

Senator SPECTER. Under what circumstances?

Dr. DILLINGHAM. Well, if you have a child who had been made phobic about sexual activity and sexual expression, he had grown up in a family that those were taboo subjects and taboo processes, then that child uninstructed and unsupervised certainly might have a lot of anxieties and fears as a result of looking at that. A lot

of stimulation from which the child would have no explanation or help in processing.

Senator SPECTER. But that would be an extreme case, an unusual case?

Dr. DILLINGHAM. Yes, but the ordinary viewer of the book, I think, with no real detriment to the author or the publishers, has to come away bored.

Senator SPECTER. Excuse me?

Dr. DILLINGHAM. It is a boring book.

Senator SPECTER. It is a boring book?

Dr. DILLINGHAM. Yes.

Senator SPECTER. We do not ban boring books.

Dr. DILLINGHAM. No. You would ruin the entire publishing industry if you did that.

Senator SPECTER. Like we do not ban boring hearings or boring Senators or boring witnesses.

Well, from what you are saying though, you cannot tell on the surface of it that the subjects have been harmed in "Show Me." If you cannot show on the surface of it that people who look at it, even children, would be harmed absent some unusual background, phobic background, then why make "Show Me" illegal?

Dr. DILLINGHAM. I am not suggesting that you should make it illegal.

Senator SPECTER. I thought you said that you thought that it would be—that the book "Show Me" should be prohibited under the existing statutes.

Dr. DILLINGHAM. No, I did not say that.

Senator SPECTER. You did not?

Dr. DILLINGHAM. No.

Senator SPECTER. So what is your opinion of the book "Show Me"?

Dr. DILLINGHAM. My opinion is that it is not a particularly harmful book. It has some limited instructional value that perhaps goes beyond the other kinds of books of instruction or education in the field of sexuality, but that it is not—it is not a Nobel prize winner, it is not an extraordinarily useful book. The only way I can see that you could possibly get at the kind of protection that perhaps you are talking about would be—and I am not sure what the constitutional validity of this kind of thing is, but it is the same kind of thing that you do with films in which you say that this is an R film or so forth. If it is possible to say that booksellers cannot sell things to minors, than you remove some of the possibility of harming minors who are not properly supervised or educated prior to the reading or looking at the book.

Senator SPECTER. Dr. Dillingham, thank you very much.

Detective Haggerty, thank you very much. Anything that you would like to call to the committee's attention additionally before we terminate?

Dr. DILLINGHAM. I would.

It seems to me that the legislation that already exists, and the legislation that is being proposed has to value not only of prosecuting people who are offensive to the public morals, but also the value of identifying the scope of the problem because with increased police activity, increased arrest and so forth, you get a

better sense of the size of the problem. You get a sense of the size of the problem, you are identifying a lot of victims as well as the offenders that may be emotionally disturbed, and I think the resources need to be addressed also. There needs to be support for funding in treatment.

Senator SPECTER. I quite agree with you, Dr. Dillingham. That is a subject we have addressed and a subject which we are addressing in another subcommittee in Health and Human Services.

Thank you very much, gentlemen. I very much appreciate your coming.

[The study prepared for the Washington School of Psychiatry by Dr. Dillingham follows:]

CHILD PORNOGRAPHY: A STUDY OF THE SOCIALSEXUAL ABUSE OF CHILDREN

EXECUTIVE SUMMARY

Prepared by:

John C. Dillingham
Principal Investigator

Elaine C. Melmed
Associate

Metropolitan Mental Health Skills Center
Special Projects Division
of the

WASHINGTON SCHOOL OF PSYCHIATRY
1610 New Hampshire Avenue, N.W.
Washington, D.C. 20009
202-667-3008

THE CHILD VICTIMS OF PORNOGRAPHY

For the past two years, the Washington School of Psychiatry, through its subdivisions, the Special Projects Division and the Metropolitan Mental Health Skills Center, has been interviewing children on the streets of Washington, D.C., Baltimore, Maryland, and New York City who can be considered to be at risk of sexual exploitation. The purpose of the interviewing has been twofold: to determine, as far as possible, the extent to which such children, involved in prostitution and sex-related activities for commercial purposes, have either been involved in, or have been invited to be involved in, pornography, and to attempt to develop a psychosocial profile of such children.

Using field initiated research, the project has interviewed close to 750 individuals - largely children at risk, child prostitutes and child pornography victims, but also parents, pimps and customers. The technique that has been used to initiate the research has been simple. In most cases, initial contact has been established by stationing an investigator in a bus station restaurant, on a street corner on one of the "strips" or "strolls" in Washington, New York or Baltimore, and allowing youthful purveyors of commercial sexual activity to approach the investigator. After some initial conversation, which is usually an exploratory probe on the part of the youngster, the investigator explains to the youngster the purpose of his presence, the interview activity, and the study itself. The latter explanation was expressed, generally, in the following way: "This study is to help to find out how people who make their living around the bus station

and on the stroll, make decisions about how they will live their lives." Upon further inquiry, the youngster would be told quite directly that the interviews had to do with the relationship of pornography to the rest of their lives.

The study also used contacts with pimps set up by police officials and police informers, and contacts with children set up in turn by these pimps. The extensive contacts with career criminals, prostitutes and pimps from other research and service programs conducted by the Washington School of Psychiatry's Metropolitan Mental Health Skills Center, also produced entree into the underworld and street life in order to establish contact with children on the street.

A significant number of retrospective interviews were done with young adults who are in their very late teens or early and middle twenties in order to get a picture at a later date of the lives of people who had started as child prostitutes and pornography participants.

Originally, it was hoped that the development of a psychosocial profile of these children would provide some clues as to possible early prevention and early intervention strategies for working with these youth and their families.

The study attempted to investigate whether it is true that the at-risk population of children forms a kind of nest of concentric circles, the largest being all those children at risk of being victimized by sexual abuse or harassment - in the family and in the home, the next largest being children actually victimized, the next being child prostitutes, and the final innermost circle being children victimized in particular, unique or unusual ways - particularly through child pornography.

The study also surveyed a large sample of organizations and groups serving at risk children and youth - runaway houses, child protective agencies, etc., in order to see what their experience had been in serving child pornography victims. A mail survey was sent to 200 agencies and organizations, with a return of 35%, a typical level of response for mail questionnaires.

These surveys indicated that youth and child serving agencies believe that child pornography is a serious problem in their communities, but have not developed any methods for interviewing their constituencies about this problem, and in general do not feel that they are very thorough in interviewing children about sexual issues.

To date the findings of the study suggest:

+ Child pornography unlike child prostitution, which appears to be a large industry, as an "industry" in the United States is probably very limited. That is, there does not seem to be a large slick commercial production of child pornography.

+ There does exist a "cottage industry" for child pornography - children acknowledge that they are invariably asked to pose for personal pornographic photos by customers on the street and in bars and restaurants and hotels. They also acknowledge observing the exchange of pornographic snapshots in which their peers are exhibited. Most children are unwilling to admit that they actively engage in such activities, although they universally point the finger at each other. Customers apparently do exchange these photos much like trading baseball cards, etc. There is also a significant amount of home movies and home video, which are also exchanged.

+ The youngsters involved in child pornography on the levels described above, fit the general description of runaway/child prostitutes:

1) The largest group are children who have been pushed out rather than runaway. They have been told directly, or by family behavior, that there is no more room for them in their homes - either for economic reasons, or for reasons of age specific family dynamics, or because of resistence to intra family sexual exploitation, or because of severe family trauma.

2) More than seventy-five percent report sexual abuse within the family.

3) An overwhelming percentage report a feeling of alienation from family lifestyle, family disciplinary culture, etc., from a very early age.

4) More than sixty percent report previous contact with mental health, social services, or other institutional helping professions. These have been perceived as actively hostile to the child, as instruments of increasing the alienation from family, and of intensifying a punitive familial attitude or policy toward the child. They are, accordingly, intensely distrusted, and perceived not as resources for help, but as reiterations of bad early family and institutional experiences.

+ The study suggests that the incidence of serious and chronic mental illness among the children and young people who engage both in prostitution and in pornography is very high. Many are the "deinstitutionalized" among the youthful mental hospital population, and not a few are individuals whose chronic mental illnesses have evidently never been treated during their lives, due to family alienation from access to conventional mental health systems. It is also evident that a significant number of young people have had situational mental health crises due to severely

traumatic family catastrophes - catastrophic deaths, suicides, murders, etc. for which they have received no emergency or crisis intervention support, and from the residual effects of which they continue to suffer.

+ The matching characteristics of this population with the most severely alienated runaway population do not adequately convey to the casual observer another important factor: these youngsters appear to share more directly characteristics with the adult homeless population. These children who are more pushed out than runaway, appear to be the "undocumented aliens" of the general population - and will be the homeless adults of the future. Their distrust of system resources, their pronounced isolation, and their vulnerability for exploitation and misuse is so severe that the likelihood of their being generally "reabsorbed" into the mainstream of American youth culture - or general culture seems minimal. +

Senator SPECTER. Before adjourning, we will make Senator Mathias' statement a part of the record as if introduced at the conclusion of Senator Grassley's opening statement.

[Whereupon, at 11:30 a.m., the subcommittee adjourned, subject to the call of the Chair.]

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